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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

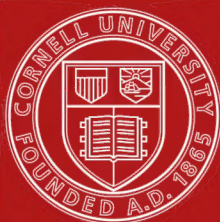
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A
TREATISE ON WILLS

BY
THOMAS JARMAN, ESQ.,

IN THREE VOLUMES.

VOLUME II.

*FIFTH AMERICAN, FROM THE FOURTH LONDON EDITION, WITH
NOTES AND REFERENCES TO AMERICAN DECISIONS.*

BY
JOSEPH F. RANDOLPH AND WILLIAM TALCOTT
OF THE NEW JERSEY BAR.

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ANALYSIS OF CONTENTS OF VOL. II.

NOTE.—*The figures refer to the pages of this edition.*

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325. Realty passed by the word "estates" although the word was before used exclusively of the particular subject.
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CHAPTER XXXI.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN.

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THE LAW WITH RESPECT TO WILLS.

VOL. II.

*CHAPTER XIV.

ELECTION.

The doctrine of election may be thus stated : That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it.¹ Doctrine of election, what. If, there-

1. This principle is well settled, and is recognized in numerous cases. See *Crosthwaight v. Hutchinson*, 2 Bibb 408; *Gore v. Stevens*, 1 Dana 204; *Smart v. Easley*, 5 J. J. Marsh. 215; *Haydon v. Ewing*, 1 B. Mon. 114; *Weeks v. Patten*, 18 Me. 42; *Smith v. Guild*, 34 Me. 443; *Waters v. Howard*, 1 Md. Ch. Dec. 112; *Hamblett v. Hamblett*, 6 N. H. 333; *Ward v. Ward*, 15 Pick. 526; *Hyde v. Baldwin*, 17 Pick. 303; *Hapgood v. Houghton*, 22 Pick. 483; *Smith v. Smith*, 14 Gray 532; *Camden Mut. Ins. Assn. v. Jones*, 8 C. E. Gr. (N. J.) 171; *Havens v. Sackett*, 15 N. Y. 365; *Persons v. Snook*, 40 Barb. 144; *Bloomer v. Bloomer*, 2 Bradf. 339; *Morrison v. Bowman*, 29 Cal. 357; *Hawley v. James*, 16 Wend. 61; *Salmon v. Stuyvesant*, 16 Wend. 321; *Robertson v. Stevens*, 1 Ired. Eq. 247; *Flippin v. Banner*, 2 Jones Eq. 450; *Weeks v. Weeks*, 77 N. C. 421; *White v. Brocaw*, 14 Ohio St. 339; *Carder v. Comrs. of Fayette County*, 16 Ohio St. 353; *Huston v. Cone*, 24 Ohio St. 11; *Lessley v. Lessley*, 44 Ill. 527; *Young v. Pickens*, 49 Ind. 23; *McElfresh v. Schley*, 2 Gill 181; *Fulton v. Moore*, 25 Penna. St. 468; *Deveaux v. Barnwell*, 1 Desaus. 497; *Williams v. Gray*, 1 Coldw. 104; *Collins v. Janey*, 3 Leigh 389; *Kinsey v. Woodward*, 3 Harr. (Del.) 459; *Stevenson v. Brown*, 3 Gr. Ch. (N. J.) 503; *Herbert v. Wren*, 7 Cranch. 378; *George v. Bussing*, 15 B. Mon. 558; *Kinnaird v. Williams*, 8 Leigh 400; *Bailey v. Boyce*, 4 Strobb. Eq. 84; *Ridgway v. Manifold*, 39 Ind. 58; *Hall v. Hall*, 1 Bland Ch. 130. See also the notes to *Streatfield v. Streatfield*, Talb. 176; 1 *White & Tudor's L. C. Eq.* 504, *et seq.*; 2 *Roper on Leg.* 1567; 2 *Redf. on Wills* 352; 2 *Wms. Ex'rs* (6th Am. ed.) 1547; *Hawkins on Wills*, 272; *Theobald on Wills* 8. Mr. Story, in his *Eq. Jurisp.* (vol. 2, § 1075), defines election to be "the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one, that

fore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him

he should not enjoy both. "A valid gift, in terms absolute, is qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition (although it is destitute of legal validity,) not express, but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit, while he declines the burden, is to defraud the design of the donor," 2 Story Eq., § 1077.

The right and duty of making election are personal, and cannot be exercised by a guardian for an infant, Huston v. Cone, 24 Ohio St. 11; Tomlin v. Jayne, 14 B. Mon. 162; (but, contra, Ridgway v. Manifold, 39 Ind. 58;) nor by a personal representative after the death of the person entitled, *Donald v. Portis, 42 Ala. 29; 2 Scribner on Dower 469; Boone v. Boone, 3 Harr. & McH. 95; Welch v. Anderson, 28 Mo. 293; Collins v. Carman, 5 Md. 503.* But in Maryland, by statute, the alienee of the heir may make the election. *Chaney v. Tipton, 3 Gill 327.* And the right and duty of making election remain, though the person to make such election be an *infant, Hamblett v. Hamblett, 6 N. H. 333; Robertson v. Stephens, 1 Ired. Eq. 247; McQueen v. McQueen, 2 Jones Eq. 16; Flippin v. Banner, 2 Jones Eq. 450; Tiernan v. Rowland, 15 Penna. St. 429; but see, contra, Tomlin v. Jayne, 14 B. Mon. 162; or married woman, Shedd v. Carey, 11 B. Mon. 181; Robertson v. Stephens, supra; Tiernan v. Rowland, supra.* To like effect see Story Eq. Jur., § 1080, a; but see also § 1097, and 2 Scribner on Dower 471, 472. In case of infancy the court will elect for the infant, *Addison v. Bowie, 2 Bland Ch.*

606; McQueen v. McQueen, 2 Jones Eq. 16; Flippin v. Banner, 2 Jones Eq. 450. Election once made is generally final, Leonard v. Crommelin, 1 Edw. 206; Craig v. Walthall, 14 Gratt. 518; Wilbanks v. Wilbanks, 18 Ill. 17; although it may be conditional—to take effect, for instance, if she (the person electing) should die within three months, McCallister v. Brand, 11 B. Mon. 370. But if made by mistake of facts or induced by fraud, it may be recalled. It was held in the case of the United States v. Duncan, 4 McLean C. C. 99, that under Illinois law an election made by a widow in ignorance of the amount of the estate may be afterwards renounced. And to the same effect see Dabney v. Bailey, 42 Ga. 521; Macknet v. Macknet, 2 Stew. (N. J.) 54; Snelgrove v. Snelgrove, 4 Desaus. 274; Davis v. Davis, 11 Ohio St. 386 (not, however, arbitrarily without order of court); Adsit v. Adsit, 2 Johns. Ch. 448; Story Eq. Jur., § 1098; Hall v. Hall, 2 McCord Ch. 269; Reed v. Dickerman, 12 Pick. 149 (but only when acting in ignorance or deceived); Smart v. Waterhouse, 10 Yerg. 94; Richart v. Richart, 30 Iowa 465. See, too Anderson's Appeal, 36 Penna. St. 476; Light v. Light, 21 Penna. St. 407; 2 Scribner on Dower 488, et seq. In Light v. Light, supra, Black, C. J., says: "If a widow who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, is induced by one who knows the law and at the same time knows her ignorance of it to release or assign it for a totally inadequate consideration, she ought to be relieved. But where the error is her own and no imposition has been practiced nor any fraudulent advantage taken, her acts done under the influence of it are as binding upon her as if she knew the law perfectly."

must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.²

And it was held in *McDaniel v. Douglass*, 6 Humph. 220, that a mere mistake as to value or amount was no ground for relief. And the acceptance of a legacy in lieu of dower will not charge it on land devised to others, *Paxon v. Potts*, 2 Gr. Ch. (N. J.) 313.

But where the provision in a will, accepted in lieu of dower, is taken for the testator's debts, or fails for other reason, the widow may revoke her acceptance of it, *Hone v. Van Schaick*, 7 Paige 221, affirmed 20 Wend. 564; *Manice v. Manice*, 1 Lans. 348; *Thompson v. Egbert*, 2 Harr. (N. J.) 459; *Gist v. Cattell*, 2 De-saus. 53; *Corriell v. Ham*, 2 Clarke (Ia.) 552; *Thompson v. McGaw*, 1 Metc. 66; *Thomas v. Wood*, 1 Md. Ch. Dec. 296. And in some states this is expressly provided by statute, 2 Scribner on Dower 494. But not for mere failure in payment of an annuity given in lieu of dower and charged on land devised, *Kennedy v. Mills*, 13 Wend. 553; nor because the estate afterwards became insolvent by emancipation of the testator's slaves, *Stephens v. Gibbs*, 14 Fla. 331; nor for a deception on the executor's part merely as to the time allowed for making her election, if her election was actually made in time and with full information as to the facts, *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512. Where a widow accepts her distributive share of the estate of her intestate husband, she is barred of her dower as well in lands which her husband had aliened as in those of which he died seized, *Evans v. Pierson*, 9 Rich. 9. Where the widow has elected to take a provision made by the will for her widowhood, she cannot afterwards, upon her remarriage, revoke it, *Baker v. Red*, 4 Dana 160; *Smith v. Bone*, 7 Bush 367;

nor can her personal representatives, after her death, retract an election made by her, *Buish v. Dawes*, 3 Rich. Eq. 281. Sometimes the right of election occurs in other cases—*e. g.*, where a choice between two gifts is expressly given by the will, *Storring v. Borren*, 55 Barb. 595; or where there is a direction to sell lands and pay the proceeds to the heir, he may elect to take the land, *Gest v. Flock*, 1 Gr. Ch. (N. J.) 108; or proceeds of land are to be laid out in the purchase of a slave to be given to A, and A elects to take the money, *Shedd v. Carey*, 11 B. Mon. 181. But the principle is not applicable to a single devise only. *Bugbee v. Sargent*, 23 Me. 269. But it does apply in a case where the testator undertakes to dispose of property which he expects to receive under the will of one whom he does not survive, *Barbour v. Mitchell*, 40 Md. 151.

2. See 1 White & Tudor's L. C. Eq. (4th Am. ed.) 541, *et seq.*; 2 Rop. on Leg. 1567; 2 Redf. on Wills 352; Wms. Ex'rs (6th Am. ed.) 1549, and notes; *Hinkley v. House of Refuge*, 40 Md. 461. So, too, *McGinnis v. McGinnis*, 1 Ga. 496; *Clay v. Hart*, 7 Dana 6, where devise was of property "yet due my wife as heiress" with seeming intention to unite his and his wife's property in a common fund, and the wife was put to her election; *Smart v. Easley*, 5 J. J. Marsh. 215; *Groves v. Kennon*, 6 Mon. 635; *Wilbanks v. Wilbanks*, 18 Ill. 17; *Wilson v. Arny*, 1 Dev. & Bat. Eq. 376; *Haydon v. Ewing*, 1 B. Mon. 114; *Tomlin v. Jayne*, 14 B. Mon. 162, where the widow was put to her election between her interest in her father's estate disposed of by her husband's will and a bequest in that will to herself; *Weeks v. Patten*, 18 Me. 42;

Thus where (a) A seized of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee-simple acre to his eldest son, who was issue in tail, and the entailed acre to his

Leonard v. Steele, 4 Barb. 20; Smith v. Guild, 34 Me. 443; so, where a devise was made to the testator's children with the proviso that if two of them should receive property from their grandfather, it should be reckoned in making an equal division of the estate, McQueen v. McQueen, 2 Jones Eq. 16; and to like effect, where advancements were made by deed of the testator, and there was clear intention in the will that the shares should be equal, Flippin v. Banner, 2 Jones Eq. 450. And in case of a devise failing by lapse or by illegality or otherwise, a legatee, who becomes entitled as heir to part of the failing devise, must make his election between them, Hawley v. James, 16 Wend. 1; Persons v. Snook, 40 Barb. 144; Bloomer v. Bloomer, 2 Bradf. 339; and that especially where he has been expressly excluded from participating in the real estate by the void devise, Thompson v. Carmichael, 1 Sandf. Ch. 387. Under the same principle requiring election falls a bequest to A, reciting that A had a claim on certain shares in B's possession and that if A urged this claim, B should have \$400 of A's legacy, Miller v. Cotton, 5 Ga. 341; or to his children on condition of their ratifying a deed made by the testator and purporting to convey their expectancy for life with covenants on his part, Leonard v. Crommelin, 1 Edw. 206.

But if the testator had some interest of his own (more than mere possession) in the thing bequeathed by him, he will be deemed to have intended only a bequest of his interest, and the owner will not in such case be put to his election between maintaining his former title and claiming the new benefit under the will, McGinnis v. McGinnis, 1 Ga. 496; Havens v. Sackett, 15 N. Y. 365; Leonard v. Steele, 4 Barb. 20; so, where the testator devised the "wheat lot," which belonged to A subject to a mortgage held by the testator, and bequeathed a writing desk to A, Beal v. Miller, 1 Hun 390. Neither will a widow be compelled to elect between *her separate property* held by her under an ante-nuptial contract and the provision made by a *general devise* to her in her husband's will, Crosthwaight v. Hutchinson, 2 Bibb 408; or *separate property* which had not come to her husband's knowledge or possession, Baker v. Red, 4 Dana 160; nor between a provision for her by will and a discharge of her separate real property from a mortgage made on it by her husband to secure his debts, not known to her and not specified in the will otherwise than by a recital that his debts were secured by mortgage, Faris v. Dunn, 7 Bush 276; nor will a residuary legatee be put to an election, McGinnis v. McGinnis, 1 Ga. 496.

(a) Anon., Gilb. Cas. Eq. 15; see also Pre. Ch. 351; Belt's Suppl. to Ves. 250; 1 Ves. 234; 1 B. P. C. Toml. 300; 3 Id. 167; Amb. 388, 1 Ed. 532; 3 B. C. C. 316; 4 B. C. C. 21; S. C., 1 Ves., Jr., 514; 4 B. C. C. 38; 1 Ves., Jr., 534; 2 Ves., Jr., 367; Id. 693; Id. 544; 3 Ves. 191; Id. 384; 5 Ves. 515; 9 Ves. 369; 13 Ves. 224; 1 Dow 249; 2 Ves. & B. 187; 2 Mer. 86; 1 Sw. 359; Id. 409; [3 Russ. 278; 4 Y. & C. 18; 2 Drew. 93.] Where

several are disappointed the sequestered property is divided among them in proportion to the value of the interests of which they are disappointed, Howells v. Jenkins, 1 D., J. & S. 617. If the property which the testator affects to dispose of belongs to several, as tenant for life and remainderman (Ward v. Baugh, 4 Ves. 623), or as tenants in common (Fytche v. Fytche, L. R., 7 Eq. 494), each has a separate right of election.

youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord Cowper said, "The devise of the fee acre to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son *shall have an equivalent out of the fee acre." And he decreed the same accordingly. [This case is the more remarkable, as showing the length to which the doctrine of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election.](b)

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will.³ Thus, a man may ^{Does not extend to derivative claims.} be tenant by the curtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits. (c) [For, compensation

[(b) See *Schroder v. Schroder*, Kay 584-586. But 9 Pri. 573, *Richards, C.*, *dub.*]

3. Thus, in *Horton v. Mercier*, 31 Ga. 225, a person taking as trustee for his children, and already holding in his own adverse possession part of the property bequeathed in trust, will not be put to his election. So, in *Carder v. Com'rs of Fayette Co.*, 16 Ohio St. 353, the widow being entitled to dower and also as heir, it was held that in the latter capacity she was not put to her election by a provision *in lieu of dower*. And it was held, in *Crosthwaight v. Hutchinson*, 2 Bibb 408, that a widow can hold her separate property, secured to her by an ante-nuptial contract, and also take under a *general devise*

to her, there being no inconsistency between them. So, too, *O'Driscoll v. Koger*, 2 Desaus. 295; *Bowen v. Bowen*, 34 Ohio St. 164. But not if plainly inconsistent. *Williams v. Crary*, 1 Coldw. 104. In *Leonard v. Crommelin*, 1 Edw. 206, however, a devisee, on condition of his ratifying with his co-devisees a deed previously made by the testator, purporting to convey the devisee's expectancy for life in certain lands, with covenants on the part of the testator, was required to elect not only between the devise and his original interest in the expectancy, but also his interest derived as heir from a deceased brother.

(c) *Lady Cavan v. Pulteney*, 2 Ves., Jr., 544, 3 Ves. 384.

[*444]

having once been made by the wife (*d*) cannot be exacted a second time. And a devisee or legatee who claims derivatively through another to whom the will gave nothing is equally free; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference: thus one co-heiress electing to take under a will, may retain a share which since the testator's death has descended to her from a deceased co-heiress, although bound to give up her own original share. (*e*)

It must however be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived. (*f*) Where the obligation to elect has once attached, the property which is taken under the will as bounty, however and whenever it may devolve, continues liable until compensation is duly made.] (*g*)

The doctrine of election clearly applies as well to [contingent as to vested rights; (*h*) to the interest of next of kin in the unascertained residue of an intestate's personal estate; (*i*) and to] reversionary and remote as well as to immediate interests. (*k*) Lord Hardwicke, indeed, at one time seems to have thought that it did not extend to a remainder expectant on an estate-tail; (*l*) but the notion stands upon no intelligible principle, and is inconsistent with his own decision in *Graves v. Forman*, (*m*) in which he would not allow an heir at law to whom an estate for life in

Does apply to contingent and reversionary interests.

[(*d*) 2 Ves., Jr., 555.

(*e*) *Wilson v. Wilson*, 1 De G. & S. 152. And see *Howells v. Jenkins*, 2 J. & H. 706; *Grissell v. Swinhoe*, L. R., 7 Eq. 291. But see per Lord Moncreiff, L. R., 7 H. L. 79.

(*f*) *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53.

(*g*) *Fytche v. Fytche*, 19 L. T. (N. S.) 343; *Pickersgill v. Rodger*, 5 Ch. D. 163. Where the person to elect is dead without electing, and his own property and that taken under the will go different ways, the latter is (as between the two) primarily liable, *Ib*. But the disappointed legatees may recover to the extent of the

latter against his general estate, *Rogers v. Jones*, 3 Ch. D. 688.

(*h*) Per Lord Loughborough, 2 Ves., Jr., 696, 697.

(*i*) *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53. How the value of such an interest is to be ascertained, see S. C., 7 H. L. 68.]

(*k*) *Webb v. Earl of Shaftesbury*, 7 Ves., 480; *Wilson v. Lord John Townshend*, 2 Ves., Jr., 697.

(*l*) *Bor v. Bor*, 3 B. P. C. C. Toml. 178, n.

(*m*) Cited 3 Ves. 67; [see *Mahon v. Morgan*, 6 Ir. Jur. 173.]

remainder after an estate tail was devised, to take it without giving up a copyhold disposed of to another, but upon which the will could not (in the then state of the law) operate, for want of a previous surrender. The heir it seems (strangely enough) elected to take the estate for life in remainder, and eventually got nothing; the tenant in tail having acquired the fee-simple by suffering a common recovery.

It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him. (n)⁴ This seems to result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great judge has observed,) "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another." (o)

Immaterial whether testator is acquainted with his want of title.

A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him *in toto*, or only to the extent of indemnifying the persons disappointed by his election.⁵ The strong current

Principle of doctrine is compensation, not forfeiture.

(n) *Whistler v. Webster*, 2 Ves., Jr., 370; *Thellusson v. Woodford*, 13 Id. 221; *Welby v. Welby*, 2 Ves. & B. 199, overruling *Cull v. Showell*, Amb. 727, unless decided on the ground of the great lapse of time, which seems probable.

4. See *Story Eq. Jur.*, § 1093.

(o) See Sir R. P. Arden's judgment in *Whistler v. Webster*, 2 Ves., Jr., 370.

5. "Another point has arisen in equity (and which could arise only in equity), and that is, whether a devisee, electing against the will, thereby forfeits the whole of the benefit proposed for him, or so much only as is requisite to compensate, by an equivalent, those claimants whom he has disappointed; so that he may entitle himself to the surplus. In other words, does such an election induce an absolute forfeiture, or only impose an

obligation on the renouncing party to indemnify the claimants whom he disappoints? There is to be found in the authorities much contrariety of opinion, incidentally expressed, upon this point. But the fair result of the modern leading decisions is, that in such a case there is not an absolute forfeiture; but there is a duty of compensation (at least where the case admits of compensation), or its equivalent; and that the surplus, after such compensation, does not devolve upon the heir as a residuum undisposed of by the will, but belongs to the donee; the purpose being satisfied for which, alone, courts of equity will control his legal right. In this respect, the doctrine of courts of equity differs, or has been supposed to differ, from that laid down in the civil law. In that law (it is said) an

of the authorities, particularly those of a recent date, is in favor of the principle of compensation; (*p*) interrupted, certainly, by *some *dicta*; (*q*) [and by an express decision of Lord Langdale,] (*r*) in favor of the doctrine of forfeiture. In *Green v. Green*, (*s*) Lord Eldon is

election against the will amounts to an absolute renunciation and forfeiture of all the bounty given by the will; and compensation to the disappointed claimants is unknown." Story Eq. Jur., § 1085. So, Adams Eq. 267: "The effect of election is not to divest the property out of the donee but to bind him to deal with it as the court shall direct." In *Jennings v. Jennings*, 21 Ohio St. 81, Scott, C. J., says: "The doctrine of compensation, as incidental to testamentary election, is an old and well established one. And resting as it does on principles of the clearest equity, no good reason is perceived for denying its proper application to the case of a widow who elects to withdraw her right of dower from the operation of the will and to forego the benefit of a provision made for her in the will in lieu thereof. * * * A widow has a perfect right to insist that the dower, which the policy of the law awards to her, shall not be taken from her by the will of a deceased husband. But she has no equitable right, as widow, to insist that the benefit intended by the testator as a compensation for her dower shall be treated, upon her rejection of it, as a lapsed legacy or devise, and go to the heir as intestate property. * * * The rule in cases of testamentary election is compensation or forfeiture and not intestacy, and the principle of compensation is applied in the case of an election against the will by a widow equally with that of a similar election by any other devisee." See, too, *Penna. Co. Ins. v. Stokes*, 61 Penna. St. 136, affirming 2 Brewst. 590. In the language of Read, J., in *Sandoe's Appeal*, 65 Penna. St. 314: "The rule in equity treats the substituted devises and bequests to the wife as a trust in her for the benefit of the disappointed claimants to the

amount of their interest therein and the court will assume jurisdiction to sequester the benefit intended for the refusing wife to secure compensation to those whom her election disappoints." See also the distinction made by Duncan, J., in *Cauffman v. Cauffman*, 17 Serg. & R. 25: "By the doctrine of sequestration to make *compensation* the intention of the testator, so far as circumstances will admit, is effected; by the doctrine of *forfeiture* the intention in many cases would be defeated." And it is said by Eccleston, J., in *Marriott v. Badger*, 5 Md. 306: "Where there is no condition annexed to a devise or bequest, *compensation* and not *forfeiture* is the principle on which equity enforces an election." See also *Key v. Griffin*, 1 Rich. Eq. 67.

(*p*) *Webster v. Mitford*, 2 Eq. Cas. Ab. 363, stated from Reg. Lib. 1 Sw. 449; *Bor v. Bor*, 3 B. P. C. Toml. 167; *Ardesoife v. Bennett*, 2 Dick. 463; *Lewis v. King*, 2 B. C. C. 600; *Freke v. Lord Barrington*, 3 B. C. C. 284; *Blake v. Bunbury*, 1 Ves., Jr., 523; *Whistler v. Webster*, 2 Ves., Jr., 372; *Lady Cavan v. Pulteney*, 2 Ves., Jr., 560; *Ward v. Baugh*, 4 Ves. 627; *Dashwood v. Peyton*, 18 Ves. 49; *Welby v. Welby*, 2 Ves. & B. 190; (see these cases stated *Gretton v. Haward*, 1 Sw. 433, n.;) [*Tibbitts v. Tibbitts*, Jac. 317.]

(*q*) *Cowper v. Scott*, 3 P. W. 119; *Cookes v. Hellier*, 1 Ves. 235; *Morris v. Burroughs*, 1 Atk. 404; *Villareal v. Lord Galway*, 1 B. C. C. 292, n.; *Wilson v. Townshend*, 2 Ves., Jr., 697; *Wilson v. Mount*, 3 Ves. 194; *Broome v. Monck*, 10 Ves. 609; *Thellusson v. Woodford*, 13 Ves. 220.

[(*r*) *Greenwood v. Penny*, 12 Beav. 406.]

(*s*) 2 Mer. 86.

generally supposed to have used expressions indicating a similar opinion. But he expressly admits the cases to have decided that the party electing against a *will* was not bound to give up more than was enough to make satisfaction for that which was intended for another; and when he states the contrary doctrine, it is with reference to the case before him, which arose upon a *deed*, "in which," he observed, "as it is a contract, it is very difficult to say that compensation only is to be made." (t) The doctrine of compensation was also subsequently recognized by the same high authority in *Kerr v. Wauchope*, (u) as well as in the earlier and much-discussed case of *Lord Raneliffe v. Parkyns*; (x) and [is now generally accepted as the settled doctrine of the court.] (y)

In order to raise a case of election, there must be a *personal* competency on the part of the author of the attempted disposition, as the doctrine is founded on intention (z) which supposes such competency.⁶ Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will. (a) And though the disability of coverture is, in some respects, distinguishable from and less absolute than that of infancy, (a *feme covert* having, it is said, a disposing mind, but not a disposing power, while an infant has neither the one nor the other,) yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If, therefore, a *feme covert*, having *a testamentary power, makes an appointment by will in favor of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right. (b)

Personal competency to express intention requisite:

as to infants and *femes covertes*.

(t) 19 Ves. 668.

(u) 1 Bli. 1.

(x) 6 Dow 149.

[(y) *Schroder v. Schroder*, Kay 578; *Howells v. Jenkins*, 1 D., J. & S. 617; *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53.] But 1 Roper's Husband and Wife, by Jacob, 556, n., is contrary; [see also Sugd. Pow., p. 575 (8th ed.), where the doctrine of forfeiture is also preferred.]

(z) *I. e.*, a disposing intention, not an intention to put the owner to his election. See per Lord Cairns, *Cooper v. Cooper*, L. R., 7 H. L. 67.

6. See *supra*, note 1.

(a) *Hearle v. Greenbank*, 1 Ves. 298.

(b) *Rich v. Cockell*, 9 Ves. 370; [*Countts v. Acworth*, L. R., 9 Eq. 519, is *contra*; but the point was not taken. In *Blaiklock v. Grindle*, L. R., 7 Eq. 215, the invalid bequest purported to be in exercise

It formerly happened, (and may still occur under a will which is regulated by the old law,) that a testator, by a will sufficient in point of execution to pass personal estate, but not adequately attested for the devise of freehold estate, devised such estate away from the heir, to whom, by the same will, he bequeathed a legacy. In such cases the heir is allowed to disappoint the testator's attempted disposition, by claiming the estate in virtue of his title by descent, and, at the same time, take his legacy, on the ground that the want of a due execution precludes all judicial recognition of the fact of the testator having intended to devise freehold estates; and, therefore, the will cannot be read as a disposition of such estates for the purpose even of raising a case of election against the heir. (c) If, however, the legacy to the heir is bequeathed upon the express condition that he shall confirm the devise, the case is otherwise: the heir then is not permitted to accept the benefit conferred upon him by the will, without performing the condition which the testator has expressly annexed to the enjoyment of his bounty. (d)

Of course this question cannot now arise under wills made or republished since the year 1837, which, if sufficiently executed for the bequest of a personal legacy, will also be effectual to dispose of freehold estate. Nor is this the only instance in which the statute 1 Vict. has tended to narrow the practical range of the doctrine under consideration; for now that the devising power extends to after-acquired real estate, it can no longer be a question (as formerly,) (e) whether the testator has, by attempting to *dispose of the

of a power given to *f. c.* if she died before her husband. The will was made in his lifetime, but he afterwards died before his wife, so that the point did not arise. As to the capacity of *f. c.* to elect, see *Frank v. Frank*, 3 My. & Cr. 171; *Wall v. Wall*, 15 Sim. 513; *Wilson v. Townshend*, 2 Ves., Jr., 693.]

(c) *Hearle v. Greenbank*, 1 Ves. 298, 3 Atk. 697, 716; *Carey v. Askew*, 1 Cox 241; *Sheddon v. Goodrich*, 8 Ves. 481; *Brodie v. Barry*, 2 Ves. & B. 127; *Gardiner v. Fell*, 1 J. & W. 22; [*Wilson v. Wilson*, 1 De G. & S. 152, seems *contra*. But see as to that case *Middlebrook v. Bromley*, 9 Jur. (N. S.) 614; and per Lord Alvanley, *Buckridge v. Ingram*, 2

Ves., Jr., 665, cited by Lord Eldon, 8 Ves. 500.]

(d) *Boughton v. Boughton*, 2 Ves. 12.

(e) See *Churchman v. Ireland*, 4 Sim. 529, [1 R. & My. 250: *Tennant v. Tennant*, 2 Ll. & G. 516; *Schroder v. Schroder*, Kay 578, 24 L. J., Ch. 510; *Hance v. Truwhitt*, 2 J. & H. 216; *ante* p. *322. In *Schroder v. Schroder* the testator (who died before the act 3 and 4 Will. IV., c. 106, § 3, came into operation,) after making his will, which purported to devise his after-acquired real estates, contracted to buy a certain estate, and then made a codicil directing his trustees to complete the purchase, and hold the estate on the trusts of the will, which were partly in

real estate to which he may be entitled at his decease, raised a case of election against the heir in respect of such property.⁷ [Even before the act, the heir was held not to be put to his election in cases of revocation by alteration of estate. (*f*)

Nearly allied to the cases last noticed, are those where a testator entitled to heritable property in Scotland, affects by will in the English form, ineffectual to pass the Scotch property, to devise it away from the Scotch heir, at the same time giving him property in England. It seems now well settled that in such cases, if the English will purports to give the Scotch property either by name or under the general denomination of property in Scotland, (*g*) or of property "in any part of the United Kingdom," (*h*) the Scotch heir is put to his election, while, on the other hand, a devise in general terms of all the testator's property whatsoever and wheresoever is held to refer only to such property as he has power to give by the will, and the Scotch heir may claim both by descent and under the will; (*i*) the first proposition also seems to apply where the disposition is in the Scotch form, but not sufficient to pass lands in England away from the English heir, (*k*) and it is presumed the latter

In what cases a Scotch heir is put to election by English will.

favor of the heir; afterwards the codicil was revoked by a conveyance to uses to bar dower in the testator's favor, (*vide ante* p. *155,) and it was held that the heir must elect. But if a testator before 1838, devised estate A, which he had contracted to buy, to one person, and estate B, with all other estates which he might subsequently acquire to another, and gave benefits to his heir, and afterwards took a conveyance of estate A to uses to bar dower in his own favor and acquired other estates, it was questioned by the V. C. whether the heir was bound to elect; for there was no intention to give estate A to the devisee of B, and the whole doctrine of election proceeded so entirely on the ground of intention, that perhaps the heir might be entitled to retain the estate against both devisees, neither of whom would have a better right against him than the other.]

7. See Story Eq. Jur., § 1094. To the effect that, prior to the statute extending the effect of a will to all lands of the tes-

tator at his death, a devise of after-acquired lands would not put the heir to his election, see *Philadelphia v. Davis*, 1 Whart. 490; *contra*, *Raines v. Corbin*, 24 Ga. 185; *Gibbon v. Gibbon*, 40 Ga. 562; *Chapin v. Hill*, 1 R. I. 446.

[(*f*) *Plowden v. Hyde*, 2 Sim. (N. S.) 171; *Tennant v. Tennant*, 2 Ll. & G. 516; Sugd. Pow. 577, 8th ed.

(*g*) *Brodie v. Barry*, 2 Ves. & B. 127; *Reynolds v. Torin*, 1 Russ. 129; *M'Call v. M'Call*, 1 Dru. 233.

(*h*) *Orrell v. Orrell*, L. R., 6 Ch. 302.

(*i*) *Johnson v. Telford*, 1 R. & My. 244; *Allen v. Anderson*, 5 Hare 163; *Maxwell v. Maxwell*, 16 Beav. 106, 2 D., M. & G. 705.

(*k*) *Dundas v. Dundas*, 2 D. & Cl. 349. The Scotch courts therefore unlike the English courts, will read against the English heir an instrument imperfectly executed according to the statute of frauds, so as to put him to an election; and in like manner the English courts (treating the Scotch heir differently from the Eng-

proposition would be held to apply also, as the doctrine of *approve* and *reprobate* in Scotland, and of election in England, seem to be identical. (l)

*It is clear that the doctrine of election is applicable to cases of appointment under a power, so that if one having a special power by his will gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favor of the latter. (m) But in cases where the appointment is made to the objects of the power absolutely, and the donee superadds a proviso or condition in favor of strangers to the power; though the proviso is void, no case of election arises. The court reads the will as if all the passages in which such attempts are made were swept out of it, for all purposes; *i. e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee, but also so far they might otherwise have been relied upon as raising a case of election. (n) A residuary appointment that carries an ill-appointed portion of the fund is in this respect undistinguishable from an absolute appointment with ineffectual modifications. Thus where the donee of a special power appointed part of the fund upon trusts that were void for remoteness, and the residue to A and B, to whom also he bequeathed part of his own estate, it was held first that the ill-appointed part did not pass as in default of appointment, but fell into the residue, and secondly that A and B were not bound to elect in favor of the remote objects. Sir W. James, V. C., collected from the authorities that "The rule as to election is to be applied as between a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied as between

lish heir, *Dewar v. Maitland*, L. R., 2 Eq. 834) will read against the Scotch heir an instrument insufficient according to the law of Scotland to disinherit him.

(l) 2 D. & Cl. 352, 1 Bligh 21, 16 Beav. 107.

(m) *Whistler v. Webster*, 2 Ves., Jr., 370; and see *Fearon v. Fearon*, 3 Ir. Ch. Rep. 19; *Reid v. Reid*, 25 Beav. 469; *Tomkyns v. Blane*, 28 Beav. 422; *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53.

(n) *Carver v. Bowles*, 2 R. & My. 301; *Church v. Kemble*, 5 Sim. 525; *Blacket v. Lamb*, 14 Beav. 482; *Woolridge v. Wool-*

ridge, Johns. 63; *Churchill v. Churchill* L. R., 5 Eq. 44. The doubts expressed in *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26, whether this is law except in cases where the proviso is in terms "so far as lawfully may be" (as in *Carver v. Bowles*) have not prevailed. And see the doctrine recognized *Roach v. Trood*, 3 Ch. D. 444, where however it was excluded by the appointee having executed the appointment, (which was by deed) and so accepted the proviso. As to the question whether the appointment is in the first instance absolute, *vide ante* p. *295.

one clause in a will and another clause in the same will." Nor was it to be applied in aid of a gift which violated the law —nor in aid of a perpetuity. (o)

With the rule as thus stated by the V. C. agree those cases which have determined that where by the same will several properties are given to the same person, some beneficial and the others burdensome, he is generally at liberty to accept the former *and reject the latter, (p) although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself; as where the repudiated gift comprises shares in a company which, after the testator's death, fails, and is wound up, the shareholders being called on to contribute, (q) or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair. (r) —unless a contrary intention appears. But the question is one of intention, and, therefore, where a testator bequeathed an annuity to A, and also a leasehold house held at a rack rent beyond its value, Sir J. Leach, M. R., thinking that the plain intention of the testator was that his estate should no longer be subject to the rent of the leasehold house, held that the legatee must take both bequests or neither. (s)⁸

Again, where one, having a testamentary power of appointment over a fund which in default of appointment belongs to A, makes his will and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) on B, and gives A certain benefits by his will; A is not put to his election, since by taking both he disappoints no actual disposition of the testator: all that can be said is that the testator was mistaken. (t)

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's: but there must be some free disposable property given to the person who is put to his election, which, if he elects —there must also be property of the testator to compensate the disappointed devisee.

(o) *Wollaston v. King*, L. R., 8 Eq. 165; *Wallinger v. Wallinger*, L. R., 9 Eq. 301; *Burton v. Newbery*, 1 Ch. D. 242; *Bizzy v. Flight*, 3 Ch. D. 274.

(p) *Andrew v. Trinity Hall*, 9 Ves. 525.

(q) *Moffett v. Bates*, 3 Sm. & Gif. 468.

(r) *Warren v. Rudall*, 1 J. & H. 1.

(s) *Talbot v. Earl of Radnor*, 3 My. & K. 254.]

8. See *Story Eq. Jur.*, § 1091.

[(t) *Langslow v. Langslow*, 21 Beav. 552; see also *Box v. Barrett*, L. R., 3 Eq. 244; and *post* ch. XVII.]

to take against the will, may be laid hold of to compensate the disappointed devisees.⁹ The doctrine is therefore inapplicable where the will deals only with property subject to special powers of appointment. Thus, where a man had an exclusive power of appointing an estate to his children and grandchildren, and an exclusive power of appointing a fund to his children only; and appointed the estate to some of his children, and the fund to his children and to a grandchild. It was held that the children were not bound to elect between giving effect to the appointment of a share in the fund to the grandchild and rejecting the estate appointed to them under the first power.](u)

The doctrine of election has been held not to apply to creditors;¹⁰

Not applicable
to creditors.

and, therefore, where a testator appropriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favor of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former.(v) And where a testator devised for payment of debts certain lands, (including some which were not his own, but belonged to his son,) the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors.(w) But now real estates of every description are assets for the payment of debts.(x)

At one period it was doubted whether evidence *dehors* the instrument was admissible for the purpose of showing that a testator considered that to be his own which did not actually belong to him, or was not under his disposing power. In the well-known case of *Pulteney v. Darlington*,(y) rent-rolls and steward's

Whether parol
evidence is ad-
missible.

9. And where an estate, A, was devised in unequal shares to children, and a second estate, B, (over which testator had no power of disposition by will,) was devised in trust for the children, to be so divided that all the shares should be equal, they were not required to elect between their interest in A under the devise and their interests independent of the will in the trust estate, *B, Penna. Co. Ins. v. Stokes*, 61 Penna. St. 136, affirming 2 Brewst. 590. See, too, *Addison v. Bowie*, 2 Bland Ch., where the testatrix, having a power of ap-

pointment to A's children, under A's will, devised the property at variance with the power. In this case the children of A were allowed to elect between his will and that of the testatrix.

[(u) *In re Fowler's Trusts*, 27 Beav. 362.]

10. See *Story Eq. Jur.*, § 1092.

(v) *Kidney v. Coussmaker*, 12 Ves. 136; see also *Clarke v. Guise*, 2 Ves. 617.

(w) *Deg v. Deg*, 2 P. W. 412.

(x) Ch. XLVI., § 1.

(y) 2 Ves., Jr., 544, and 3 Ves. 384.

accounts were admitted to prove that the testator dealt as absolute owner with lands of which he was only tenant in tail, and, consequently, that he must have intended them to pass under a general devise of his real estate, so as to impose election on the heir in tail, to whom, by the same will, a benefit was given, though the testator had a large estate of his own, to which the words were applicable. (z)

Lord Commissioner Eyre, however, in *Blake v. Bunbury*, (a) laid it down, that “the intent of the testator to dispose of that which was not his, ought to appear on the will.” The admissibility of extrinsic evidence, too, was strongly denied by Lord Loughborough, in *Stratton v. Best*; (b) and the same judge expressed his disapprobation of *Pulteney v. Lord Darlington*, in *Rutter v. Maclean*; (c) as did Lord Eldon in *Pole v. Lord Somers*, (d) and *Druce v. Dennison*. (e) In the latter case, however, Lord Eldon admitted a statement of property written by the testator, and books of account, as evidence that he considered himself to be owner, and, as such, intended to dispose of certain mesuages and leases, the property of his wife, part of which the *testator had made his own by alienation; but Lord Eldon seems to have regarded the papers themselves as testamentary, and to have thought that he must either admit the testator’s explanatory statement as extrinsic evidence, or give the parties an opportunity of propounding it as part of the will in the Ecclesiastical Court. However, in a subsequent case (f) he observed that he thought the rules as to election had been settled: “It must appear on the face of the will, that the testator proposes that there should be an election, and as to what subjects.” And he referred to *Druce v. Dennison* as standing, to some extent at least, on the special ground which has been noticed. He also adverted to a case of *Andrews v. Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had power to dispose of by deed or will,) for purposes for which his own was insufficient; Sir L. Kenyon, M. R., directed an inquiry whether by personal property he meant his own strictly, or intended to include both: but when the evidence was taken, he was so much struck with

(z) See also *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Rutter v. Maclean*, 4 Ves. 531; *Pole v. Lord Somers*, 6 Ves. 309; and *Druce v. Dennison*, Id. 385; and see *Finch v. Finch*, 4 B. C. C. 38, 1 Ves., Jr., 534.

(a) 1 Ves., Jr., 523.

(b) 1 Ves., Jr., 285.

(c) 4 Ves. 537.

(d) 6 Ves. 322.

(e) Id. 402.

(f) *Doe v. Chichester*, 4 Dōw 76, 89, 90.

his own decision, that he said, "Though the evidence has been taken, I shall not now admit one word of it, it being necessary, for the general interests of mankind, that persons should in their wills state clearly what they mean."

The doctrine thus earnestly advocated by these eminent judges has prevailed in subsequent cases. As in *Clementson v. Gandy*, (g) where parol evidence was tendered for the purpose of showing that the testatrix had supposed herself to be absolute owner of, and intended to include in the residuary bequest in her will, certain settled property, in which she had only a life interest, in order to raise a case of election against a legatee under the will, who also took an interest in such property under the settlement; but the evidence was rejected, Lord Langdale, M. R., observing that the intention to dispose must in all cases appear by the will itself; that there was no ambiguity in the expressions the testatrix had employed; and extrinsic evidence for the purpose of contradicting the intention was inadmissible.

With respect to the intention, as manifested by the will itself, it is to be observed, that, in order to raise a case of election, it must be clear and decisive;¹¹ for if the testator's expressions will *admit of being restricted to property be-

Parol evidence rejected.
Expressions must be clear in order to raise a case of election.

(g) 1 Kee. 309; see also *Dixon v. Sampson*, 2 Y. & C. 566. [The exploded doctrine of *Pulteney v. Darlington* was treated *obiter* as law by Jessel, M. R., 5 Ch. D. 171; but the subsequent cases were not cited.]

11. See Story Eq. Jur., § 1086; *Baker v. Red*, 4 Dana 160; *Waters v. Howard*, 1 Md. Ch. 112; *Fuller v. Yeates*, 8 Paige 325; *Wood v. Wood*, 5 Paige 601. And this intention must be clearly expressed or follow by necessary implication from the provisions of the will. See *Creswell v. Lawson*, 7 Gill & J. 228; *Havens v. Sackett*, 15 N. Y. 365; *Penna. Co. Ins. v. Stokes*, 61 Penna. St. 136; and so, in the absence of statute, to bar dower, *Green v. Green*, 7 Port. (Ala.) 19; *Hilliard v. Binford*, 10 Ala. 977; *Alling v. Chatfield*, 42 Conn. 276; *Tooke v. Hardeman*, 7 Ga. 20; *Bailey v. Duncan*, 4 Mon. 265; *Norris v. Clark*, 2 Stockt. 51; *Lefevre v. Le-*

fevre, 59 N. Y. 434, reversing 2 Sup. Ct., T. & C. 330; *Lasher v. Lasher*, 13 Barb. 106; *Jackson v. Churchill*, 7 Cow. 287; *Church v. Bull*, 2 Denio 430, affirming 5 Hill (N. Y.) 206; *Larrabee v. Van Alstine*, 1 Johns. 370; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Bond v. McNiff*, 6 Jones & S. (N. Y. Super. Ct.) 83; *Fuller v. Yeates*, 8 Paige 325; *Webb v. Evans*, 1 Binn. 565; *Kennedy v. Medrow*, 1 Dall. 414; *McCullough v. Allen*, 3 Yeates 10; *Brown v. Caldwell*, Spears Ch. 322; *Whilden v. Whilden*, Riley Ch. 205; *Douglass v. Feay*, 1 W. Va. 26; *Clark v. Griffith*, 4 Iowa 405; *McElfresh v. Schley*, 2 Gill 181; *Jones v. Jones*, 8 Gill 197; *Wilson v. Army*, 1 Dev. & Bat. Eq. 376. Such intention is implied where the provision of the will is clearly inconsistent with the other interest claimed, *Williams v. Gray*, 1 Coldw. 104; *McLeod v. McDonnell*, 6 Ala. 236; *Duncan v. Duncan*, 2 Yeates

longing to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power. Thus, in *Dummer v. Pitcher*, (*h*) where the testator having, before making his will, transferred certain £4 per cent. and £5 per cent. stock (then forming the whole of his funded property,) into the joint names of himself and his wife, bequeathed the rents of his leasehold houses, and the interest of *all his funded property or estate*, of whatsoever kind, to trustees, upon trust for his wife for life, and after her decease upon trust to pay divers legacies of £4 per cent. stock, the aggregate amount of which fell short by £50 only of the amount of stock of that description so formerly transferred by him: he afterwards made some further purchases of £5 per cent. stock, taking the transfers in the joint names of himself and his wife. The testator at his death left no funded property, except the £4 per cents. and £5 per cents. before mentioned, exclusive of which his assets were greatly inadequate to pay his legacies. It was held first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election. (*i*)

In like manner a general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the

General devise
restricted to
property of tes-
tator.

302; *Hamilton v. Buckmaster*, 2 Yeates 389. Such intention is sometimes implied as regards curtesy or dower from a devise to others of lands which would have been otherwise subject to such right. See *Huston v. Cone*, 24 Ohio St. 11, where a direction to lease, &c., accompanied a devise of lands in trust, and the testatrix's husband was required to elect between his curtesy in the land devised and a bequest of personal property. So, too, *Apperson v. Bolton*, 29 Ark. 418; *Lord v. Lord*, 23 Conn. 327; *Brown v. Caldwell*, Speers Ch. 322; *Whilden v. Whilden*, Riley Ch. 205; *McLeod v. McDonnell*, 6 Ala. 236; *Alling v. Chatfield*, 42 Conn. 276; *Dodge v. Dodge*, 31 Barb. 413; *Savage v. Burnham*, 17 N. Y. 577; *Adams v. Adams*, 5 Metc. 277. See, *contra*, *Bailey v. Duncan*, 4 Mon. 265; *Jackson v. Churchill*, 7 Cow. 287; *Story Eq. Jur.*, § 1088.

(*h*) 5 Sim. 35; 2 My. & K. 262; see also *Crabb v. Crabb*, 1 My. & K. 511; [*Blommart v. Player*, 2 S. & St. 597; *Parker v. Carter*, 4 Hare 411; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Seaman v. Woods*, 24 Beav. 381.

(*i*) See *Att.-Gen. v. Fletcher*, 5 L. J., (N. S.) Ch. 75;] and compare *Shuttleworth v. Greaves*, 4 My. & Cr. 38, where certain canal shares standing in the joint names of the testator and his wife were held to be intended to pass under a be-

devise could operate;¹² for though a general disposition would not, in wills made before the year 1838, pass after-acquired real estate, and, therefore, the presumption rather is that the testator, in framing such a devise, had a particular property in his contemplation; yet the presumption is not of such force as alone to constitute an adequate ground for holding a gift of the testator's property to comprise what belonged to another; a conclusion which seems to be more improbable than the supposition that *the testator introduced into his will a general or residuary disposition, without having in view any particular property.

The same principle was held, in *Timewell v. Perkins*, (*k*) to apply to a devise of a specified kind of property, as "ground rents;" in regard to which, however, it is to be observed, that the bequest would have included, and, therefore, might have been designed to include, *leasehold* ground-rents purchased by the testator after the making of the will; so that no inference that he had not his own property in contemplation arises from the circumstance of his not having any such when he made his will; and the same remark applies to devises affecting even real estate in wills made or republished since the year 1837, which (as already shown)(*l*) are operative on after-acquired property of this description.

With respect, however, to wills which are subject to the old law, it is to be observed, that, though a general devise is (as we have seen) construed as comprising property belonging to the testator and that only, even when there is nothing properly and strictly his own on which it can operate; yet a devise of lands answering to a particular locality seems to stand upon a different footing. It is hardly to be supposed that a testator would make such a devise without having a particular property in view. In *Read v. Crop*, (*m*) however, where a testator had devised all his freehold and copyhold estates at Roydon, Thorley, Epping, and Witham, in the counties of Essex and Herts (which copyholds he had surrendered to the use of his will,) to his wife for life, and after her decease in trust for his children; and it appeared that the testator, at the time of his death, (*quære*, at the making of his will?) was seized in fee of a copy-

quest of "my shares in the N. Canal Navigation," so as to put the wife to her election, the testator having no shares of his own answering to the description.

too, *Crosthwaite v. Hutchinson*, 2 Bibb 408; *Evans v. Webb*, 1 Yeates 424.

(*k*) 2 Atk. 102.

(*l*) *Ante* p. *64.

(*m*) 1 B. C. C. 492.

12. See Story Eq. Jur., § 1087. See,

hold estate at Witham, and also of the moiety of an estate at Thorley, to the other moiety of which he and his wife were entitled in her own right; they were also seized in her right of two copyhold estates at Roydon and Epping; but in these places the testator, in his own right, had no property. It was contended, that the testator having taken upon himself to devise his wife's estates, she must be put to her election; but Lord Thurlow said, that the testator had described what he meant to devise by the words, "the estates which he had surrendered." He had not surrendered any of his wife's estates, so that they could not pass by the devise. According to another report, ⁽ⁿ⁾ his lordship said: "I think *these words are too loose to raise the construction contended for. If he had devised all his estates generally, there would have been no doubt; and I cannot think that his mentioning his estates in the four places by name is sufficient to make me suppose that he meant to devise his wife's estates. As to Thorley, there can be no pretence for it, since he had an estate there to answer the description; and I think, therefore, the wife is not called upon to make an election."

Lord Thurlow's remarks, it is conceived, must be taken in connection with the special circumstances of the case before the court; for he could hardly mean to affirm, as a general position, that where a testator devises all his lands at A, ^{Suggested distinction between general devises and devises restricted by locality.} having no other property there than lands which he holds in right of his wife, he is not to be presumed as intending to dispose of that property. The difference between such a case and that of a general devise of all the testator's real estate is obvious. The reference to locality shows that he has a particular property in view; and if it be answered that every devise, however general in its terms, is specific, we may (without denying this as a general principle) reply, that such clauses are frequently inserted in wills to take in any property which may have escaped the testator's recollection, or may not be within his knowledge; which cannot be affirmed of a devise of lands in a particular parish or town, or even county. Such a question, however, will present itself under a different aspect in regard ^{How affected by 1 Vict., c. 26.} to wills made since the year 1837, which (we have seen) ^(o) speak, in reference to the property comprised in them, from the death; [though even with regard to them, if they devise lands in a particular locality, it is difficult to say that no inference that the tes-

(n) Cox's MS.; 1 Sw. 402, n.

(o) *Ante* ch. X.

tator had some specific property in view arises from the fact of his having none of his own to satisfy the devise at the date of its execution ; for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now, or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may thereafter buy some such property. (*p*) Where the devise is specific in the sense of being a gift of a particular estate, as "my R. property," the wife alone and not the devisor being entitled to that property, she must undoubtedly elect. (*q*) And *where (*r*) a testator was seized of freeholds in fee simple and of copyholds in tail, and himself occupied parts of each, and had let other parts of each to tenants at entire rents, and then by will, dated in 1859, devised his "real estate" upon trust as to the "lands occupied by him" for his wife, and confirmed his tenants "in their present occupations at their present rents" for twenty-one years ; it was held that the heir in tail of the copyholds (to whom an annuity was bequeathed) must elect.]

But the most numerous as well as the most difficult class of cases with which the courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share or [some partial or limited] interest in the property ; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements, but whether he intended the devise to comprise such property, inclusive of the interest of his co-owner.¹³ [Thus, in *Padbury v. Clark*, (*s*) the testator being entitled to a moiety of a freehold house, devised "all that my freehold messuage, &c., now on

Question,
whether testa-
tor intends to
include interest
of co-proprie-
tor.

Padbury v.
Clark.

[(*p*) Per Wood, V. C., *Usticke v. Peters*, 4 K. & J. 455.

(*q*) *Whitley v. Whitley*, 31 Beav. 173 (will in 1857.)

(*r*) *Honywood v. Forster*, 30 Beav. 14.]

13. In general, where the testator has a present interest in property of A, he will be supposed to intend a devise of that interest only, and not to put A to an election between his interest and a provision for him in the will. Story Eq. Jur., § 1089. So, too, *Leonard v. Steele*, 4 Barb. 20. And the same thing has been

held where the testator's interest was merely contingent on an event, which did not happen, and the legatees took upon its not happening. *Havens v. Sackett*, 15 N. Y. 365. But mere possession in the testator, without an interest, will not raise that presumption, *McGinnis v. McGinnis*, 1 Ga. 496 ; nor a life interest in the testator, with reversionary interest in the legatee, *Upshaw v. Upshaw*, 2 Hen. & M. 381.

[(*s*) 2 Mac. & G. 298.]

lease to A and in his occupation," giving the person entitled to the remaining moiety benefits under his will; he was also entitled to a moiety of some other property, which he devised by the description of "all that my moiety," &c. Lord Cottenham observed that he found no ground for a doubt as to the intention to give the entirety; that the words were ample, complete and correct for that purpose, but wholly inapplicable to the supposed gift of a moiety only: and that if this were matter of any doubt, this construction would be strongly corroborated by the other devise, which showed how the testator described a moiety when his intention was to give only a moiety. The L. C. therefore held that the owner of the other moiety must elect. A direction to repair the specifically described property would likewise corroborate this construction; (t) but it would appear from Lord Cottenham's judgment, and from subsequent authorities, (u) that a specific devise as of the entire subject will generally suffice, without such assistance, to put the co-owner to his election.

So, in *Swan v. Holmes*, (x) where a sum of £10,000 consols stood settled in trust for two sisters for life, and after their ^{Swan v. Holmes.} deaths, two-thirds of the capital in trust for their brother, and one-third in trust for their sisters; and the brother bequeathed the whole of his property to trustees, as to part on certain trusts for his sisters; and he afterwards bequeathed the property, "including the £10,000 trust money," to other persons; it was held that the sisters must elect between the benefits given them by the will, and their interest in the £10,000 consols.

So, where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. *Prima facie*, the testator must of course be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power to dispose of, be indicated; and for this purpose, notwithstanding some strong expressions tending to show the difficulty of applying the doctrine of election to such cases, (y) the ordinary rules for collecting the

Question, whether testator, having reversion only, intends to include the immediate interest.

(t) *Howells v. Jenkins*, 2 J. & H. 706. 417; *Miller v. Thurgood*, 33 Beav. 496. There was no such direction in *Padbury v. Clark*. (x) 19 Beav. 471; see remarks on *Reynolds v. Torin*, *post* p. *465.

(u) *Wilkinson v. Dent*, L. R., 6 Ch. 339; *Fitzsimons v. Fitzsimons*, 28 Beav. 517. (y) See per Lord Eldon, in *Rancliffe v. Parkyns*, 6 Dow 149.

testator's intention must be observed, the question being simply, what does the testator mean? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established. (z) But these indications of intention will not prevail against an express and unreserved confirmation of the settlement creating the estates which precede the testator's reversion. Express declaration overrides conjecture, however probable. (a)

Again, if a testator, having an estate subject to an encumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition; and the encumbrancer to whom other benefits are given by the will, is not, in such a case, put to his election; still less, if the beneficiary be entitled only to participate in the encumbrances with others to whom no benefit is given by the will. (b) So if, being an encumbrancer only, the testator devise the estate, this may be satisfied without *imputing an intention to dispose of more than his own interest. (c)

A similar question, and one which has been frequently agitated, is } whether the widow of a testator [to whom she was married before 1834] is precluded, by a benefit given to her by his will, from claiming dower out of lands devised by that will. }
Dower when put to her election.
 It is clear that a mere devise in general terms of the testator's real estate affords no indication of an intention to dispose of the dower.¹⁴ This was adjudged so long

(z) *Welby v. Welby*, 2 Ves. & B. 187; *Wintour v. Clifton*, 21 Beav. 447, 8 D., M. & G. 641; *Usticke v. Peters*, 4 K. & J. 437.

(a) *Rancliffe v. Parkyns*, 6 Dow 149. But confirmation of a *portion* of the settlement leaves the remaining portion unconfirmed, *Blake v. Bunbury*, 1 Ves., Jr., 514.

(b) *Stephens v. Stephens*, 3 Drew. 697, 1 De G. & J. 62.

(c) *Maddison v. Chapman*, 1 J. & H. 470.]

14. In most of the states the question as to what will put a widow to her election between dower and the provision for her by her husband's will is now settled

by statutes. These generally provide that any devise of land (sometimes of personal property) will bar dower unless expressly renounced by the widow within a limited time. These statutes will be found in some detail in 2 Scribner on Dower 464, § 110, *et seq.* Thus a devise of real and personal property for life has been held to put her to her election, *Herbert v. Wren*, 7 Cranch 370; so a direction that the whole estate be kept together until the youngest child should attain twenty-one, for the support of the family, and then divided among the wife and children—by statute, *McLeod v. McDonnell*, 6 Ala. 236; or a general devise,

ago as the case of *Lawrence v. Lawrence*,^(d) where a testator gave certain legacies to his widow, and also part of his real estate during widowhood, and devised the residue of his estate to other persons; and it was held in D. P. that she was not precluded by the acceptance of the legacies from claiming dower in the whole.

Hilliard v. Binford, 10 Ala. 977; *Shaw v. Shaw*, 2 Dana 342; *Luigart v. Ripley*, 19 Ohio St. 24; or a provision of both real and personal property, though only valid as to the latter, *Vaughan v. Vaughan*, 30 Ala. 329; or a "home and support" for the widow charged on certain land (as to that land), *Worthen v. Pearson*, 33 Ga. 385; or, by statute of Kentucky, a mere legacy, *Timberlake v. Parish*, 5 Dana 352; see, as to former Kentucky statute, *Wood v. Lee*, 5 Mon. 58; or a devise for widowhood, *Stark v. Hunton*, Saxt. 216; or a devise of certain rooms in testator's house for her life, *Morgan v. Titus*, 2 Gr. Ch. (N. J.) 201; or a provision that the acceptance should forever exclude the widow "from any further demands on my estate," *Norris v. Clark*, 2 Stock. 51; or a devise in trust to sell and pay one-half of the principal to the children and the income of the other half to the widow for life, with remainder to the children, *Colgate v. Colgate*, 8 C. E. Gr. (N. J.) 372; or a bequest of a room to the widow, with maintenance and a devise of the real estate to the sons, *White v. White*, 1 Harr. (N. J.) 202; or a bequest of personal property to the widow, with power to the executors to sell and manage the real estate, *Tobias v. Ketchum*, 32 N. Y. 319, reversing 36 Barb. 304; or a devise of

one-third to the widow and two-thirds to testator's son, with power to his executors to make sale, lease and manage, and with limitation over of the two-thirds on the son's death under age, *Sullivan v. Mara*, 43 Barb. 523; or, by statute of Ohio, a bequest of personal property, *Jennings v. Jennings*, 21 Ohio St. 56; or a specific legacy and the income of one-third of the proceeds of the real estate when sold, with directions to sell the real estate and divide the proceeds, *Duncan v. Duncan*, 2 Yeates 302; or a devise of lands for widowhood and bequest of personal property, with remainder to the children, *Hamilton v. Buckwalter*, 2 Yeates 389; or a gift of one-third of the personal property and one-third of the real property for widowhood, and a specific legacy "over and above her thirds," and all the rest of the estate to his children, *Creacraft v. Dille*, 3 Yeates 19; *Creacraft v. Wions*, 1 Addis. 350; or a devise with remainder over on death or re-marriage, "my will being that she shall have no interest whatever in my estate after her second marriage," *Wilson v. Hayne*, 1 Cheves 37; or, by statute of Tennessee, any provision, *Reid v. Campbell*, 1 Meigs 378; or a covenant upon separation that the husband would make provision by which the wife should have at least one-third of his estate, *Wat-*

(d) 2 Vern. 365, 1 Eq. Cas. Ab. 219, pl. 2, 1 Freem. Ch. Cas. 234, 3 B. P. C. Toml. 484, 8 Vin. Abr., Copyh., 361, pl. 22; see also *Lemon v. Lemon*, 8 Vin. Abr., Copyh., 366, pl. 45, 2 Eq. Cas. Ab. 355, pl. 13; *Hitchin v. Hitchin*, Pre. Ch. 133, 2 Vern. 403; *Brown v. Parry*, 2 Dick. 685; *Inledon v. Northcote*, 3 Atk. 430; *Strahan v. Sutton*, 3 Ves. 249; *Lord Dorchester v.*

Earl of Effingham, G. Coop. 319; see also *Ayres v. Willis*, 1 Ves. 230; *Waller v. Fuller*, 8 Vin. Abr., Copyh., 244, pl. 19. [So a bequest to the widow on condition that she make no claim on "the residue of my property," was held not to exclude her from dower. *Wetherell v. Wetherell*, 4 Gif. 51.]

And the addition of the word "all" would not enlarge the operation or vary the construction of the devise, which is still but a gift

kings v. Watkins, 7 Yerg. 283; as to the construction of the Virginia statute, see *Ambler v. Morton*, 4 Hen. & M. 23; as to Illinois statute, see *Sturgis v. Ewing*, 18 Ill. 176; or "of a certain house, lot and furniture, to be used by wife during her life," *Collins v. Carman*, 5 Md. 503; so, too, in Maryland, any devise (unless in effect nothing shall pass by such devise), *Gough v. Manning*, 26 Md. 347; and in Indiana any provision not in lieu of dower, unless it clearly appear that testator intended her to have both, *Young v. Pickens*, 49 Ind. 23. So any provision plainly inconsistent with right of dower will put the widow to an election, *e. g.* an ante-nuptial contract in lieu of dower, *Camden Mut. Ins. Ass. v. Jones*, 8 C. E. Gr. (N. J.) 171; or a deed of settlement during coverture, *Taylor v. Browne*, 2 Leigh 419; *Lasher v. Lasher*, 13 Barb. 106; *Pickett v. Peay*, 2 S. C. Const. Rep. 746; *Grignard v. Mayrant*, 4 Desaus. 614; and where, by statute, the widow has a right to elect between dower and a *child's* share, the child's share so elected to be taken will be considered as dower, and a partition of the estate will be equivalent to an assignment of dower, *Orrick v. Robbins*, 34 Mo. 226. On the other hand a general devise, prior to the statute, was held not to be a bar to dower in *Green v. Green*, 7 Porter (Ala.) 19; *Evans v. Webb*, 1 Yeates 424; *Lasher v. Lasher*, 13 Barb. 106; nor a devise and bequest, *Havens v. Havens*, 1 Sandf. Ch. 324; *Kennedy v. Medrow*, 1 Dallas 414, although of much greater value than the dower; nor, under the statute of Delaware, which made a devise of land to be in lieu of dower, a direction to the executors to set apart \$3000 out of the estate and pay the interest to the widow, *Chandler v. Woodward*, 3 Harring. 428; nor a bequest of a slave, *Baily v. Duncan*, 4 Mon. 265; or of personal property, *Fulton v. Fulton*, 30 Miss. 586; nor a devise in

trust for the widow, in the absence of express words, the statute providing only for an implied bar by a devise to the widow, *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; nor a devise to doweress of a part of the land which is subject to her dower and of the rest to another, *Leonard v. Steele*, 4 Barb. 20; nor a direction that on the youngest child attaining the age of twenty-one, one-third of the estate be set aside for the widow for life, *Mills v. Mills*, 28 Barb. 454; nor a devise of a house to the widow and a farm to testator's sons, *Jackson v. Churchill*, 7 Cow. 287; nor a general devise to the widow for life or widowhood with remainder to her children, *Walworth, C.*, saying: "To deprive her of dower the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which such dower was claimed, so that the intention of the testator in relation to some part of the property devised to others would be defeated, if such claim was allowed," *Church v. Bull*, 2 Denio 430, affirming 5 Hill (N. Y.) 206; nor a bequest of personal property "in lieu and stead of every other claim and pretension my wife can or may have on my estate," *Larrabee v. Van Alstine*, 1 Johns. 370; see also *Adsit v. Adsit*, 2 Johns. Ch. 448; *Smith v. Kniskern*, 4 Johns. Ch. 9; nor a gift of "the free and uninterrupted use" of the whole estate until the youngest child attain the age of twenty-one, *Bond v. McNiff*, 6 Jones & S. (N. Y. Super. Ct.) 83; nor an annuity to the widow together with the possession and direction of a certain farm, *Wood v. Wood*, 5 Paige 601; nor an annuity and personal property, *Fuller v. Yeates*, 8 Paige 325; nor a devise in trust for the widow's support during widowhood or until the youngest child attain the age of twenty-one, *Sanford v. Jackson*, 10 Paige 266; nor a devise to the widow

of "all" the testator's own estate. Thus, in *Thompson v. Nelson*, (e) where a testator devised "all and singular" his real estates whatever, and all his goods, chattels, and personal estate, to trustees, upon trust in the first place to pay his wife the sum of £480, and then to apply the residue amongst his three children—Sir L. Kenyon, M. R., held that she was entitled to both, on the principle that to put the widow to her election, "it should appear that, if she took both dower and the provision under the will, some other part of the testator's disposition would be defeated."

According to these authorities, as well as upon principle, it seems to be immaterial whether the lands devised to the widow be or be not

of a room and the lands to testator's sons, *Webb v. Evans*, 1 Binn. 565; nor a legacy to be paid one year after sale of testator's lands, with direction to sell the lands and, after payment of debts and legacies, divide the proceeds, *Sample v. Sample*, 2 Yeates 433; nor a residuary gift of the personal property and the "benefit" of the real property until the children come of age, *McCullough v. Allen*, 3 Yeates 10; nor a devise of the property that came with her in marriage, *Gordon v. Stevens*, 2 Hill Ch. (S. C.) 48; nor devise and bequest to her, with "remaining property" to be divided among his children, *Brown v. Caldwell*, Speers Ch. 322; *Whilden v. Whilden*, Riley Ch. 205; nor a power of sale to executors, they to make good and sufficient title "of equal tenor with those I now hold," *i. e.*, subject to dower, *Kinsey v. Woodward*, 3 Harring. 459. In Maine, the waiver of the provision made for the wife in the will of her husband, entitles her to dower in his real estate, but she will not be entitled to any part of the personality if it is disposed of by the will. *Perkins v. Little*, 1 Greenl. 148. But see *Brown v. Hodgdon*, 31 Me. 65. In *Sanford v. Jackson*, 10 Paige 268, Walworth, C., says: "The common law principle upon which the widow is compelled to elect, between her dower and a provision made for her in the will of her deceased husband, is well settled, and the only difficulty arises in applying it to the

varying circumstances of each particular case. Where the testator in terms declares that the provision made in favor of the wife is in lieu of dower, if she accepts the provision she cannot have her dower in the testator's estate also; even in those cases where the assignment of her dower would not interfere with any other provision of the will, except such declared intent of the testator. But to bar her of her dower by implication, where the testator has not in terms declared his intention on the subject, by his will, the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower; so that the intention of the testator will be defeated, as to some part of the property devised or bequeathed to others, if she takes her dower as well as the provision made for her in the will. (*Pickett v. Peay*, 2 Tread. Const. Rep. (S. C.) 748; *McCullough v. Allen*, 2 Yeates Rep. 10.) And to deprive the wife of her dower or to compel her to elect, it is not sufficient that the provisions of the will render it doubtful whether the testator intended she should have her dower, in addition to the provision made for her by the will; but the terms and provisions of the will must be such as to show an evident intention, on the part of the testator, to exclude the claim of dower."

(e) 1 Cox 447; see also *Dowson v. Bell*, 1 Kee. 761; *Harrison v. Harrison*, Id. 765.

part of that out of which her dower arises; nor, it should seem, would her dower be excluded even in respect of the lands so devised. Where the contrary has been decided, it has always been upon the ground of the testator having introduced into the devise some special provision which is irreconcilable with the widow's claim of dower; as by prescribing a *mode of enjoyment that requires the devisee to have the entirety of the property.¹⁵

Thus, in *Birmingham v. Kirwan*, (f) where a testator devised his house and demesne to trustees, upon trust to permit his wife to enjoy the same for life, she paying 13s. yearly for every acre, to keep the house in repair, and not to let, except to the person who should be in possession of the remainder; and the residue of his lands, subject to debts and legacies, to A for life, remainder to B in fee. The question was as to the wife's right of dower; first, in the part devised to her; secondly, in the residue. Lord Redesdale—
What provisions are inconsistent with claim of dower. "The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with

15. The testator's intention to make the widow's provision take the place of her dower must be expressed, or clearly implied from otherwise repugnant provisions, 4 Kent 58; *Stewart v. Stewart*, 4 Stew. 398, 408; *Brown v. Brown*, 55 N. H. 106; *Evans v. Webb*, 1 Yea. 424; *Stark v. Hunton*, Saxt. 216; *Jackson v. Churchill*, 7 Cow. 287; *Ostrander v. Spickard*, 8 Blackf. 227; *Clark v. Griffith*, 4 Iowa 405; *Kelly v. Stinson*, 8 Blackf. 387; *Knighton v. Young*, 22 Md. 359. But see *Smith v. Baldwin*, 2 Ind. 404.

In *Brown v. Pitney*, 39 Ill. 468, a direction to sell, with annuity to the widow payable out of the proceeds of such sale, was construed to be in lieu of dower. (But see *Jennings v. Smith*, 29 Id. 116.) So where after a life estate given to the widow, testator directed the property to be sold, and proceeds to be divided among his children, it was held that this provision was, under the Iowa statute, inconsistent with the widow's claim of dower, and that it must be construed to

be in lieu of dower. *Cain v. Cain*, 23 Iowa 31. See also *Watrous v. Winn*, 37 Iowa 72. In *Whilden v. Whilden*, Riley Ch. 205, it was held that a legacy of \$1000 was in addition to dower. In this case, it was said by Dessausure, C.: "There is scarcely any man owning real estate who does not know that his wife is entitled to dower, and the law implies that knowledge. The presumption therefore is that where a testator bequeaths a legacy to his wife he intends it in addition to the legal provision of dower, unless he declares it to be in bar of dower, and she shall have both." See also *Pickett v. Pecay*, 3 Brev. 545; *Cunningham v. Shannon*, 4 Rich. Eq. 135; *Higginbotham v. Cornwall*, 8 Gratt. 83; *Sully v. Nebergall*, 30 Iowa 339; *Metteer v. Wiley*, 34 Iowa 214; *Collins v. Woods*, 63 Ill. 285; *Wiseley v. Findlay*, 3 Rand. 361; *State Bank v. Ewing*, 17 Ind. 68. But if the taking of dower by the widow clearly interferes with the provisions of the will, she must elect. *Dixon v. McCue*, 14 Gratt. 540.

(f) 2 Sch. & Lef. 444.

the assertion of a right to demand a third of the land to be set out by metes and bounds. It is clear the assertion of a right of dower as to the house and demesne would be inconsistent with the devise of the house and demesne. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the enjoyment of the house and demesne, paying a rent of 13s. an acre, which must be paid out of the whole. (g) Then follow directions that she shall keep the house and demesne in repair, that she shall not alien, except to the person in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming title by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the house and demesne under a right created by the will; and not part of it under a right which she previously had, and part under the will." On the other question, however, his lordship held, that the devise of the beneficial interest in the house and demesne was not a bar to the widow's right of dower in the rest of the estate. The will might be perfectly executed as to all other purposes, without injury to the claim of dower. With respect to the rest of the estate, it might be mortgaged or sold subject to that claim.

It should be observed, that a restriction on letting, which was one of the circumstances adverted to by Lord Redesdale in the preceding case, had been held by Sir R. P. Arden, ^{As to direction to let;} M. R., in *Strahan v. Sutton*, (h) not to render the devise inconsistent with *the dowress' claim, though it was contended that she might have her dower set out by metes and bounds; in answer to which, the M. R. said, "It has been determined, that the widow need not take it by metes and bounds; she may take a rent-charge; she may take one-third of the rents and profits. To think she would occupy one chamber in this house, in order to let it to those persons," (i. e. the persons to whom it was prohibited to be let,) "is really most extravagant." The devise in *Strahan v. Sutton* containing this prohibitory direction was to another person, and not to the dowress as in *Birmingham v. Kirwan*. The principle of the two cases, however, is not

(g) Why out of the whole? If a devise of my house and demesne does not include the dower, how can an obligation clearly means every acre of what is before devised), extend it? See *infra*.
(h) 3 Ves., Jr., 249.
to pay a certain rent for every acre (which

easily distinguishable. Subsequent judges, certainly, seem to have followed Lord Redesdale, in allowing weight to circumstances of a less decisive and unequivocal character than Sir R. P. Arden thought necessary (i) to create an inconsistency which would exclude the doweress' claim. As in *Miall v. Brain*, (k) Sir J. Leach, V. C., held, that the claim of dower was inconsistent with a trust to permit another to use, occupy and enjoy the estate for her life; his Honor thinking that the testator contemplated the personal use, occupation and enjoyment.

So, in *Butcher v. Kemp*, (l) the same learned judge considered that a direction to trustees (to whom a farm was devised during the minority of the tenant for life, who was the testator's daughter) "to carry on the business thereof, or to let the same upon lease for her benefit," was inconsistent with the claim of dower. "The testator's plain intention," said the V. C., "is that his trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this intention must be disappointed, if the widow could have assigned to her a third part of this land." How far this argument and decision are obnoxious to the reasoning applied to some of the cases stated in the sequel, the learned reader will form his own opinion.

[Again, in *Hall v. Hill*, (m) there was a general devise of the testator's estates to a trustee, upon trust to pay his wife an annuity, and to permit her to enjoy part of the property for her life, and the residue was otherwise disposed of. By a codicil a power to lease was given to the trustee. Sir E. Sugden, C., decided that the widow must elect between her dower and the *benefits under the will. He observed, that "he was not aware how a power of leasing in the case before him could be exercised over all the estate, if the widow's right to dower were allowed. He could understand how the rents might be enjoyed or the estate sold subject to the claim for dower; but how could the estate be demised subject to the right of the lady to have a third part set out by metes and bounds?" In *O'Hara v. Chaine*, (n) before the same judge, there was a devise to trustees, upon trust to sell and a power to lease from year

A power to lease puts the widow to her election.

(i) See his judgment in *French v. Davies*, 2 Ves. Jr., 576, and in *Strahan v. Sutton*, 3 Ves. 250.

(k) 4 Mad. 119.

(l) 5 Mad. 61; [see also *Roadley v. Dixon*, 3 Russ. 192.

(m) 1 D. & War. 94, 1 Con. & L. 120.

(n) 1 J. & Lat. 662.

to year so much as remained unsold, and also a direction to the trustees to complete the sale of lands contracted to be sold by the testator in his lifetime. As to the estates contracted to be sold, the court said there was no doubt the widow must elect, as in the absence of any stipulation the contract imported that they were to be conveyed discharged of dower; as to the residue the power of leasing was sufficient to show she must also elect. These decisions as to the effect of a power of leasing have been followed by Sir J. K. Bruce, V. C., in *Grayson v. Deakin*, (o) and by Sir R. T. Kindersley, V. C., and the Court of Appeal, in *Parker v. Sowerby*; (p) (in which latter case the circumstance that the power was limited to the minority of the devisees was considered to make no difference,) and, yielding to the current of authority, by Sir J. Stuart, V. C., in *Linley v. Taylor*. (q)

However fine the distinction, yet it is clearly settled, in accordance with the opinion of Lord Redesdale, (r) that a general devise of all the testator's estates upon trust for sale will not put the widow to her election; because the sale may be made subject to her right of dower. (s)¹⁶ But in a case where there was a devise of a particular house, with the furniture and appurtenances, upon trust for sale, Sir L. Shadwell, V. C., thought the

Power of sale does not put the widow to her election.

(o) 3 De G. & S. 298; and see *Reynard v. Spence*, 4 Beav. 103; *Lowes v. Lowes*, 5 Hare 501; *Pepper v. Dixon*, 17 Sim. 200. See also *Thompson v. Burra*, L. R., 16 Eq. 592.

(p) 1 Drew. 488, 4 D., M. & G. 321, overruling *Warbuton v. Warbuton*, 2 Sm. & Gif. 163.

(q) 1 Gif. 67.

(r) *Ante* p. *459.

(s) *Ellis v. Lewis*, 3 Hare 313; *Gibson v. Gibson*, 1 Drew. 42; *Bending v. Bending*, 3 K. & J. 257.]

16. In *Colgate v. Colgate*, 8 C. E. Gr. (N. J.) 379, *Zabriskie, C.*, says: "In the case of *Ellis v. Lewis*, 3 Hare 310, the provisions of the will were substantially as those in *Colgate's* will. The testator devised all his real estate to a trustee, in trust to sell and invest the proceeds, and to pay the income arising from one moiety of it to his wife during widowhood, and to pay the income of the other moiety and

of the whole after the death or re-marriage of his wife, to his sister. Sir James Wigram held that the devise should not be held inconsistent with and in lieu of dower, and that the widow was not put to her election. He notices the three cases above mentioned (*Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jacob 503; *Roberts v. Smith*, 1 Sim. & Stu. 513), and held that his determination did not conflict with them, supposing that these cases did not intend to overrule the doctrine well established, that a mere devise of lands in trust for sale did import an intention to devise it otherwise than in lieu of dower. He does not seem to have realized that the decision in those cases was based upon the fact that the disposition of the proceeds in part to herself, was inconsistent with her claim to dower, and showed an intention that this was in lieu of dower. He holds, without reference to authority, that the direction to

widow must elect. (t) "How," he asked, "could there be a sale of the house if the lady had said, 'No, I will have a third of it?' Directing the property to be sold *with the appurtenances attached to it*, is necessarily inconsistent with the claim of dower." The difference between the two cases is not clear.

Where lands are included in one devise to trustees, and powers Election as to the whole property implied from powers relating to part. *or directions are given to them as to part sufficient to exclude the widow's dower as to that part, she will, it seems, be put to her election as to the other part also. The powers or directions expressed as to part show how the trustees were intended to take the whole.] (u)

Another point much discussed has been, as to the effect of the pro- As to devise to doweress and another in equal shares. perty being devised to the doweress and others in equal shares. In *Chalmers v. Storil*, (x) the devise was in these words: "I give to my dear wife A and my two children (naming them) all my estates whatsoever, to be equally divided amongst them, whether real or personal." One of the questions was, whether the wife, taking a share under this devise, was bound to relinquish her dower. Sir W. Grant considered the claim of dower to be directly inconsistent with the disposition of the will. He said, "The testator directing all his real and personal estate 'to be equally divided,' &c., the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the widow first takes out of it her dower, and then a third of the two remaining thirds. Further, by describing his English estates, he excludes the ambiguity which Lord Thurlow, in *Foster v. Cooke*, (y) imputes to the words 'my estate,' as necessarily extending to the wife's dower."

Lord Thurlow's observation in *Foster v. Cooke*, to which probably Remarks on Chalmers v. Storil. Sir W. Grant referred, was made in answer to an argument founded on the testator's direction to trustees to possess themselves of "all his estates and substance," and was as follows: "Because he gives all his property to trustees, am I to gather

divide the proceeds of the sale cannot decide what the subject of the sale is. I

am inclined to consider the judgment of Sir William Grant, Sir John Leach, and Sir T. Plumer, as of more authority than that of Vice Chancellor Wigram, standing as it does alone."

[(t) *Parker v. Downing*, 4 L. J., (N. S.)

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Ch. 198.

(u) *Miall v. Brain*, 4 Mad. 119; *Roadley v. Dixon*, 3 Russ. 204; *O'Hara v. Chaine*, 1 J. & Lat. 665.]

(x) 2 Ves. & B. 222. [But is the report correct? See 3 K. & J. 261, 262.]

(y) 3 B. C. C. 347.

from his having given all he has, that he has given that which he has not?" That he would not have considered the word "English," (which, it is observable, does not appear in the case as reported,) to constitute a ground for varying the construction, is evident from his decision in *Read v. Crop*, (z) where he held that a devise of estates in a certain locality did not demonstrate an intention to include the testator's wife's interest in lands in which he and she had undivided shares; or, indeed, even lands belonging exclusively to the wife, though the testator had no lands of his own answering to the locality. It is evident, however, that the M. R. did not wholly rely on this ground, as *he lays much stress upon the words importing equality of division. That these words ought not to influence the construction, will be apparent upon a moment's consideration. The presumption being (as we have seen,) that a testator means to dispose of his own interest exclusively of that of any co-owner, it follows that every devise is first to be read as applying to that interest, and, unless some repugnance or inaptitude occurs in such an application of the testator's language, there is no ground for extending the devise to that portion of interest which is not disposable by him. Now, to try *Chalmers v. Storil* by this test. A testator gives all his estates, or all his *English* estates (no matter, for the present purpose, which,) to A, (who has dower or any other interest in the lands,) B, and C, "equally to be divided among them." These words are obviously satisfied by applying them to the interest, whatever it may be, belonging to the testator; for nothing is to be divided but what is before given; and as it is clear that, if the devise had stopped at the names of the devisees, it would not have included the dower, the subsequent words evidently ought not to be made a ground for extending them. The argument for such a construction is evidently fallacious: it makes the words "all my estates" extend to the dower, by reason of the after-added expression, "equally to be divided;" assuming, in opposition to the established construction of devises couched in these general terms, that the dower is one of the subjects "to be divided." It is remarkable that a judge, whose logical acuteness and powers of reasoning have deservedly excited admiration, should not have instantly detected the fallacy of the argument. (a)

(z) *Ante* p. *454.

[(a) See, however, *per Wickens, V. C.*, 727, where the power to lease was not
Thompson v. Burra, L. R., 16 Eq. 602; relied on by the V. C.]

But, however unsatisfactory may be the principle upon which *Chalmers v. Storil* stands, it seems to have been adopted in several subsequent cases. Thus, in *Dickson v. Robinson*, (b) where the testator having given his real and personal estate to his widow, upon trust, for the equal benefit of herself, his two daughters, and the child or children with which she was then pregnant—Sir T. Plumer, M. R., on the authority of *Chalmers v. Storil*, held, that the widow, if she took under the will, must relinquish her dower.

So, in *Roberts v. Smith*, (c) where a testator devised to his wife *M., a freehold messuage in fee simple, his ready money, and household furniture. He then devised to A and B, and the said M. certain freehold and leasehold messuages, and all other his estates and property, upon trust to apply one-half part of the money arising therefrom to M., so long as she should remain unmarried, for the support of herself and the children of her former husband, until they should attain twenty-one; and then, upon trust to pay the same, and also the other half part of the moneys to arise as aforesaid from the time of the testator's death, for the maintenance of his (the testator's) children until twenty-one; and, on attaining that age, such child to take an equal share of his said freehold property. The widow claimed dower. Sir J. Leach, V. C., said, "The principle referred to in *Chalmers v. Storil* decides this case. The plain intention of the testator was, that the wife should have half the income of his property for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower."

Undoubtedly, if an intention to give an immediate interest in the entire *corpus* of the land can be perceived in these cases, the intended equality would be destroyed by letting in the dower. But how does this intention appear? There is no other evidence of it than a simple devise of the land, which all the authorities, from *Lawrence v. Lawrence* down to *Dorchester v. Effingham*, tell us demonstrates no intention to give a larger interest than the testator has; otherwise, indeed, the question could never arise, as

(b) Jac. 503.

(c) 1 S. & St. 513. [And see *Goodfellow v. Goodfellow*, 18 Beav. 356.]

the widow must, in every case, be excluded from dower in land devised by the will, or relinquish all claims under it. The probability is, that in these cases the testator never thinks of the dower; but that, as Lord Alvanley has observed, is not sufficient for her exclusion: "it must appear that he did know it, and meant to bar her, or that what she demands is repugnant to the disposition." (d) This principle, indeed, is not denied in *Chalmers v. Storil* and *Roberts v. Smith*, but the great difference consists in the application of it.

[Sir J. Wigram commented on these cases in *Ellis v. Lewis*, (e) where the devise was upon trust to sell and pay debts and legacies, and invest the residue of the proceeds, and pay a moiety of the income to the testator's wife during her widowhood, and the other moiety to his sister for life, with bequests over after their decease. The V. C., in deciding that the widow was not obliged to elect, founded his judgment on the ground that, according to the cases, a trust for sale was not inconsistent with dower, and that the direction to divide the proceeds of sale could not decide what the subject of the sale was, so as to show that it included the interest of the widow: and he distinguished the cases before noticed, and apparently opposed to this construction, on the ground that in them there was a direction to divide the *subject of gift itself*; in the case before him, it was the proceeds of the sale only that were to be divided, and he referred to the close of the judgment in *Chalmers v. Storil*, as showing that, in Sir W. Grant's opinion, the testator there intended his property to be divided as it stood *in specie*, an intention certainly inconsistent with the right of dower.]

In *Reynolds v. Torin*, (f) where a testator bequeathed to his wife during her life four-sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond, as appeared by the schedule of his property annexed to his will, (in which he had specified the amount of this bond,) but the infant heir having elected, under the order of the court, to claim against the will, took that bond by his legal title, subject to the widow's right of terce—Lord Gifford, M. R., held, that the widow must elect, and that, although disappointed of the four-sevenths of the interest of the bond debt which the testator meant her to enjoy,

(d) See *French v. Davies*, 2 Ves., Jr., 577. *Gibson*, 1 Drew. 58; *Bending v. Bending*, 3 K. & J. 257.]

[(e) 3 Hare 314; see also *Gibson v.* (f) 1 Russ. 129.

she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate.

As the testator had stated this bond at its full amount in the schedule of his property, perhaps this case may be sustained independently of the reasoning on which *Chalmers v. Storil* and the other cases of that class (which, it is observable, were not cited in it,) are founded; though certainly the ground of distinction would have been much stronger if the widow's terce had extended to a portion of the capital; for, subject to her claim in respect of part of the income, the capital was still the property of the testator.

Another question which has been much litigated between the *dowress and devisees, is, whether she is put to her election by a rent-charge, or an annuity charged on the property out of which the dower arises. Lord Hardwicke, in *Pitts v. Snowden*, (*g*) decided that she was not, [and although this has not been uniformly followed (*h*) it] seems to have been treated as clear [in all the later cases.] (*i*)

And it seems to be the sound doctrine. It ought, in the words of Lord Alvanley, in *French v. Davies*, (*j*) "to be clear, plain, and incontrovertible, that the testator could not possibly give what he has given, consistently with her claim of dower." A mere annuity [though a circumstance deserving weight] (*k*) certainly furnishes no such incontrovertible evidence; on the contrary, the more reasonable supposition is, that the testator gives that which he has power to dispose of, and that only; and the answer to the argument commonly urged, that the remedy by distress requires that the entirety of the lands should be subject to the annuity, and not the two-thirds only, is that the dowress takes not an undivided third, but the entirety of a divided share, which is set out by metes and bounds. In *French v. Davies* (as well as in *Greathorex v. Carey*, (*l*) where a similar decision was made by Lord Alvanley,) the annuity was charged on a mixed fund,

(*g*) 1 B. C. C. 292, n.

(*h*) *Arnold v. Kempstead*, Amb. 466, 2 Ed. 236; *Villa Real v. Lord Galway*, Amb. 682, more fully reported 1 B. C. C. 292, n.; *Jones v. Collier*, Amb. 730; *Wake v. Wake*, 3 B. C. C. 255, 1 Ves., Jr., 135.

(*i*) *Pearson v. Pearson*, 1 B. C. C. 291; *Foster v. Cooke*, 3 B. C. C. 347; *Miall v.*

Brain, 4 Mad. 119; *Dowson v. Bell*, 1 Kee. 761; [*Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Lowes v. Lowes*, 5 Hare 501; *Hall v. Hill*, 1 D. & War. 103.]

(*j*) 2 Ves., Jr., 572.

(*k*) *Per Wickens, V. C., Thompson v. Burra, L. R., 16 Eq. 602.*

(*l*) 6 Ves. 615.

consisting of both real and personal property, and the same occurred in *Miall v. Brain*. In *Pearson v. Pearson*, (*m*) Lord Loughborough seems to have thought that the annuity was a bar of dower if the annual value of the lands was not adequate to satisfy both; but this appears to introduce a fluctuating and unsatisfactory rule, and the notion derives no countenance from any of the recent cases. (*n*)

And here it may be observed, that where a widow is barred of her dower in lands devised by the will, by a benefit given to her in satisfaction of such claim, the exclusion is considered as made, not in favor of the devisee personally, but of the estate; and, consequently, it enures to the benefit of the heir, in case of the devolution of the land upon him by the failure of the devise. (*o*)

*But it has been decided that a gift to the widow in satisfaction of all her claims on the testator's estate, does not preclude her from claiming her share of the personalty under the statutes of distribution, in the event of the failure of a bequest of that property.¹⁷ And, therefore, where a testator gave certain property to his wife in satisfaction of all dower or thirds which she could claim out of his real and personal estate, or either of them, and bequeathed his personal estate to charitable purposes, (which bequest was void as to real securities,) it was held that the clause in question did not prevent the widow from claiming her share in the real securities, with the next of kin, since neither the heir-at-law, nor by parity of reasoning, the next of kin, can be barred by anything but a disposition of the heritable subject, or personal estate, to some persons capable of taking. (*p*) [So an annuity given to the widow

To whom the
bar of dower
enures.

Widow, when
excluded from
share of per-
sonalty.

(*m*) 1 B. C. C. 291.

[(*n*) Except *Warbutton v. Warbutton*, 2 Sm. & Gif. 163, which, however, is overruled, *ante* p. *461.]

(*o*) See *Pickering v. Lord Stamford*, 3 Ves. 337.

17. This rule holds good whether the bequest of the personal property be originally void, *Manice v. Manice*, 1 Lans. 348; *Lefevre v. Lefevre*, 59 N. Y. 434, reversing 2 Thomps. & C. 330; or fail by lapse, *Hatch v. Bassett*, 52 N. Y. 359; as well as in cases of intestacy as to the personal property, *Melizet's Appeal*, 17 Penna. St. 449; *Kempton's Appeal*, 23 Pick. 163; *Nickerson v. Bowly*, 8

Metc. 424; but not to cases where the personalty is disposed of by residuary gift, *Perkins v. Little*, 1 Greenl. 148. But where a widow has elected, under the third section of the Missouri dower act, to take personalty in lieu of dower, she cannot have the real estate of her husband sold to pay his debts, so as to exempt the personalty so selected by her, *Chinn v. Stout*, 10 Mo. 709.

(*p*) *Pickering v. Lord Stamford*, 2 Ves., Jr., 272, 581, 3 Ves. 332, 492; see also *Sampson v. Hutton*, 11 Vin. Abr., Copyh., 185, 2 Eq. Cas. Ab. 439, but more correctly stated 3 Ves. 335; [but a declaration to this effect in a *settlement* will, of

“in lieu and satisfaction of all dower and thirds or *other claims and demands* which she could or might have had or been entitled to” out of the testator’s estate, will not bar her right as *customary heir* to her husband in respect of copyholds not disposed of by his will.] (q)

The difference between such a case and that of dower seems to be this: Where a testator gives a benefit in lieu of dower, he purchases an interest in the estate for the benefit of any and every person claiming that estate under him, whether as heir or devisee; and the exclusion of the dower arises, not from the disposition of the property, (which, it has been shown, will not *per se* exclude the dower,) but from the provision for the widow being given expressly in satisfaction of it, and, consequently, is not affected by the failure of the disposition. Whereas, in the case under discussion, though the gift is expressed to be in satisfaction of the widow’s claim on the testator’s estate, yet, in fact, the efficient part of the exclusion consists in the disposition, which gives the property to some other person: that disposition therefore failing, the widow’s claim under the statutes of distribution is revived; and such claim is not inconsistent with any disposition in the will. It would seem to follow, from this view of the subject, that where the exclusion of the dower by means of election arises merely from the terms and mode in which the estate *subject to the dower is devised, there is strong ground for holding that the failure of the devise lets in the claim of dower.¹⁸ The question, of course, is always a question of intention to be collected from the whole will.

[And with regard to the widow’s exclusion from her share of the personality, it is said to be different if, on the face of the will, there is an original intestacy as to a part of the personal estate: on the ground that the exclusion cannot then be represented as auxiliary to any disposition of that portion of the personality: it must have an independent effect; and the only effect it can possibly have is to exclude the widow

course, effectually bar the widow, *Gurly v. Gurly*, 8 Cl. & Fin. 743; *Druce v. Denison*, 6 Ves. 395; the former case appears to overrule *Slatter v. Slatter*, 1 Y. & C. 28.

(q) *Norcott v. Gordon*, 14 Sim. 258.

18. And such gift accepted bars dower in testator’s after-acquired lands, though

they are not disposed of by the will, *Raines v. Corbin*, 24 Ga. 185; *Gibbon v. Gibbon*, 40 Ga. 562; *Chapin v. Hill*, 1 R. I. 446. And it has been held that election of such gift bars dower not only in the lands of which the testator died seized, but also in all lands which he had previously held and conveyed, *Allen v.*

from participation in the undisposed part of the personalty. This was so decided by Sir J. Stuart, V. C., in the case of *Lett v. Randall*.^(r) He distinguished the case from one where it might be attempted to exclude the heir from taking undeviseed realty, without effectually disposing of it to some other person. The equivalent to that in regard to personalty would be an attempt to exclude all the next of kin, which would be as nugatory as an exclusion of all mankind. In the case before the court, the exclusion of the widow would enure to the benefit of the remaining next of kin.]

A provision made for a wife "for her jointure, and in lieu of dower and thirds, at common law [out of any real or personal estate," though strictly speaking, the widow has no thirds at common law out of her husband's personal estate, has been held to extend to her distributive share out of such estate.^(s) Where the provision was made "for a jointure and in lieu of dower and thirds at common law" (without express mention of personal estate), and was charged on the land only, it was held to be clear that the widow was excluded only from further claim against the land.^(t) But where the provision was made in similar terms, and charged both on real and personal estate, it was held that you must look to the fund out of which the provision was made, and that the widow was therefore excluded from her share of the personal as well as the real estate.^(u) The words "in lieu of dower or thirds at common law or otherwise," have been held to extend to the wife's right of freebench in copyholds.]^(v)

What bars widow of share in personal estate.

The question whether a dowress is put to her election by the contents of her husband's will, will less frequently arise in regard *to widows whose marriage was since the 1st of January, 1834; as such persons may, under the act of 3 and 4 Will. IV., c. 105, be excluded from dower by various acts of the husband, including a disposition of the property by deed or will [(for which a general devise has been held sufficient)],^(x) or a mere declaration therein, or a rent-charge, or other interest devised to her out of

Effect of 3 and 4 Will. IV., c. 105, upon points discussed in this chapter.

- Pray, 3 Fairf. 138; *Steele v. Fisher*, 1 Edw. 435; *Palmer v. Voorhis*, 35 Barb. 479; *Moore v. Steidell*, 1 Disney 281; but see, *contra*, *Borland v. Nichols*, 12 Penna. St. 38.
- [^(r) 3 Sm. & Gif. 83, not appealed on this point, 2 D., F. & J. 338. But see *Sykes v. Sykes*, L. R., 4 Eq. 200.
- ^(s) *Gurly v. Gurly*, 2 D. & Wal. 463, 8 Cl. & Fin. 743.
- ^(t) *Colleton v. Garth*, 6 Sim. 19.
- ^(u) *Thompson v. Watts*, 2 J. & H. 291.
- ^(v) *Nottley v. Palmer*, 2 Drew. 93.
- ^(x) *Lacey v. Hill*, L. R., 19 Eq. 346.

any lands subject to dower; but a mere gift of personal estate, or of an interest in lands not liable to dower, will not defeat the widow's claim. [This act does not affect copyholds; (y) but it must be remembered that the wills act, 1 Vict., c. 26, has been held (z) to render a devise of copyholds as effectual as a surrender to bar the widow of freebench.

The ordinary doctrine of election may, doubtless, be excluded either wholly or partially, if the testator so desires. "The rule in *Noys v. Mordaunt*," said Lord Hardwicke, (a) "of not claiming by one part of a will in contradiction to another, is a true rule, but has its exceptions. * * * Several cases have been, and several more may be, in which a man shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from *another benefit*, though it may happen to be contrary to the will; for the court will not construe it as meant in lieu of everything else when he has said a particular thing; which East has done in his will, declaring what the provision for the plaintiff should be in satisfaction of, not of this sum of money. Let the defendant, therefore, transfer it to plaintiff."

The case put by Lord Hardwicke (ending with the words "said a particular thing") occurred in *Brown v. Parry*, (b) where a testator gave his wife an annuity "to be accepted by her in lieu of her dower," and also bequeathed other benefits to her (without adding in lieu of her dower); the widow elected not to take the annuity, but to keep her dower; and it was held by Lord Thurlow that she was nevertheless entitled to take the rest of the testator's bounty, and that the case was too clear for argument. In truth, this is not properly a case of election at all; which arises only when something is taken *against* the will. There is here a legacy upon an express condition *which is submitted to*; and another legacy without express condition. Why should a *condition be annexed by implication to the latter bequest, when by taking it the legatee disappoints no part of the will?

But the case is different where a gift is made in lieu of a particular thing expressed, and there is then a question,—not whether the legatee, while rejecting the proposed exchange, can take another gift *under the will* unconditionally, but—whether, while accepting the exchange, he

(y) *Powdrell v. Jones*, 2 Sm. & Gif. 407; *Smith v. Adams*, 5 D., M. & G. 712. (a) *East v. Cook*, 2 Ves. 33. See also *Bor v. Bor*, 3 B. P. C. Toml. 167.

(z) *Lacey v. Hill*, L. R., 19 Eq. 346, (b) *Romilly's No. Cas.* 85, also reported, but imperfectly, 2 Dick. 685.

can insist on his right to another property *against* the will. Thus, in *Wilkinson v. Dent*, (c) where a testatrix gave to her brother T. £10,000 in satisfaction of any sums in which she then was or might at her death be indebted to him, and to her brother W. £3000 in lieu and satisfaction of any rent-charge out of a certain part of her real estate, and specifically disposed of the entirety of another estate, in which both brothers had interests. It was held that the brothers taking their legacies must bring these latter interests into account as well as the debts and the rent-charge. Sir W. M. James, L. J., said, "there are two legacies which the will declares are to be taken in satisfaction of certain demands against the estate. It is the common case where the father of a family leaves a legacy to a member of his family, and says you must take that and not raise *any question* against my estate. It is argued that in such a case there is a special direction which prevents election as to other parts of the will, and reference was made to *East v. Cook*. It is not very easy to understand that case, but it was probably of this kind: My eldest son is owner of a bit of property; it would be very convenient if this bit of property should go along with a property which I am devising to my second son; so I make a devise of this bit of property to the second son; and, *among other gifts* to my eldest son, I give him a piece of property which I state in my will to be in lieu of his bit of property, which I purport to take away from him. (d) In such a case the eldest son is merely put to his choice between those two bits of property. It is a case where the ordinary doctrine of election is excluded by an apparent expression of intention by the testator, that only one of the gifts to the eldest son is conditional on his giving up what the testator purports to take away from him. *Such a case in no way governs the present. * * * The question is whether there is testamentary bounty to a person whose estate and right are by another part of the will interfered with. It is clear there is, though before the amount of the bounty can be ascertained,

(c) L. R., 6 Ch. 339. See also *Fytche v. Fytche*, 19 L. T. (N. S.) 343; the report of which L. R., 7 Eq. 494, omits to state the gift upon which the whole case turned, viz. the gift of the wife's navigation shares, after her death, away from her.

(d) The L. J. did not say how much

of this he supposed to be expressed in the will, and how much to be supplied by conjecture. The case put resembles that put by Lord Hardwicke, but both of them differ from the case which actually arose in *East v. Cook*, since what the plaintiff there claimed and took he took *against* the will, viz. Goff's £1000.

[*471]

the amount of the claim which the legatee had against the testatrix must be ascertained."

In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect to them, &c. ; (e)¹⁹

From what acts
an election is
presumed.

(e) *Wake v. Wake*, 1 Ves., Jr., 335, and the other cases mentioned 1 Sw. 381, n.; *Reynard v. Spence*, 4 Beav. 103; *Edwards v. Morgan*, 13 Price 782, M'Clel. 541, 1 Bli. (N. S.) 401; *Brice v. Brice*, 2 Moll. 21; *Wintour v. Clifton*, 21 Beav. 468; *Sopwith v. Maughan*, 30 Beav. 235; *Wilson v. Thornbury*, L. R., 10 Ch. 239.]

19. Acceptance of the testamentary provision is the most ordinary way of making election. *Grider v. Eubanks*, 12 Bush 510; *Clay v. Hart*, 7 Dana 6; *Smart v. Easley*, 5 J. J. Marsh. 215; *Weeks v. Patten*, 18 Me. 42; *Tiernan v. Rowland*, 15 Penna. St. 429; *Fulton v. Moore*, 25 Penna. St. 468; *Bradford v. Kents*, 43 Penna. St. 474; *Cox v. Rogers*, 77 Penna. St. 160; *Cauffman v. Cauffman*, 17 Serg. & R. 16; *Shivers v. Goar*, 40 Ga. 676; *Wilson v. Hayne*, 1 Cheves 37; *Thompson v. Hook*, 6 Ohio St. 480; *Shotwell v. Sedam*, 3 Ohio 1; *Jones v. Powell*, 6 Johns. Ch. 194; *Van Orden v. Van Orden*, 10 Johns. 30; *Steele v. Fisher*, 1 Edw. 435; *Davison v. Davison*, 3 Gr. (N. J.) 235; *Stark v. Hunton*, Saxt. 216; *Sanders v. Sanders*, 22 Miss. 81; *Delay v. Vinal*, 1 Metc. 57; *Smith v. Bone*, 7 Bush 367; *Gibbon v. Gibbon*, 40 Ga. 562; *Sewell v. Smith*, 54 Ga. 567; *Story Eq. Jur.*, § 1097; *McDowell v. McDowell*, 1 Bailey Eq. 318; *Stoddard v. Cutcompt*, 41 Iowa 329. So, too, election to accept the land devised is shown by mortgaging or conveying it, *Gest v. Flock*, 1 Gr. Ch. (N. J.) 108; *Pratt v. Felton*, 4 Cush. 174. In like manner, in the absence of statutory provision for dissent, election to reject the will may be shown by bringing suit to enforce the adverse right, *Hapgood v.*

Houghton, 22 Pick. 483; *Watkins v. Watkins*, 7 Yerg. 283; *Quarles v. Garrett*, 4 Desaus. 146; *Wilson v. Hamilton*, 9 Serg. & R. 424; or by appearance in court in a pending suit, and a renunciation in that suit, *O'Reilly v. Nicholson*, 45 Mo. 160. But if the devisee also hold a mortgage upon the land devised, the bringing of an action to foreclose the mortgage will not amount to an election not to take as devisee, *Winship v. Winship*, 43 Ind. 291. By force of the statute in many states election to accept the provisions of the will is presumed from the failure to file the dissent thereto, within the time and in the manner prescribed by the statute, *Cauffman v. Cauffman*, 17 Serg. & R. 16; *Waterbury v. Netherland*, 6 Heisk. (Tenn.) 512; *Pratt v. Felton*, 4 Cush. 174; *Douglass v. Feay*, 1 W. Va. 26; *Stilley v. Folger*, 14 Ohio 610; *Crow v. Powers*, 19 Ark. 424; *Lord v. Lord*, 23 Conn. 327; *Smith v. King*, 50 Ga. 192; *Ex parte Moore*, 8 Miss. 665; *Malone v. Majors*, 8 Humph. 577; *Hastings v. Clifford*, 32 Me. 132; *Dougherty v. Barnes*, 64 Mo. 159; *Kemp v. Holland*, 10 Mo. 255; *Grant v. Henley*, 64 Mo. 162; *Collins v. Carman*, 5 Md. 503; *Gough v. Manning*, 26 Md. 347; *Kinnaird v. Williams*, 8 Leigh 400; *Bretz v. Matney*, 60 Mo. 444; *Blunt v. Gee*, 5 Call 481; *Noel v. Garnett*, 4 Call 92; *Craven v. Craven*, 2 Dev. Eq. 338; and that without notice to her from the executors, *Palmer v. Voorhis*, 35 Barb. 479; *Price v. Woodford*, 43 Mo. 247. But this is not so where the will limits a longer time for the payment of the legacy, *Gale v. Gale*, 48 Ill. 471. And when the time is limited by statute it makes no difference whether the letters

and a person having elected under a misconception is entitled to make a fresh election ; (f) and the fact of a person not having been called

testamentary are issued to an executor or to an administrator *cum testamento annexo*, *Smith v. Smith*, 20 Vt. 270; nor after long acquiescence will the illegality of the probate affect the validity of the election, *Sanders v. Sanders*, 22 Miss. 81. It was formerly held in Kentucky that a court of equity had no power to extend the time fixed by statute, *Nicholas v. Nicholas*, Sneed 338; but it has since been held that the time may be extended until the condition of the estate can become known, *Smither v. Smither*, 9 Bush 230; *Grider v. Eubanks*, 12 Bush 510. So, too, an election made before probate is sufficient, *Atherton v. Corliss*, 101 Mass. 40; *Sherman v. Newton*, 6 Gray 307; but not an election during coverture endorsed on the will itself, *Kreiser's Appeal*, 69 Penna. St. 194. But see *Stoddard v. Cutcompt*, 41 Iowa 329. If no time is fixed by statute, a reasonable time only will be allowed, *Reed v. Dickerman*, 12 Pick. 149; *Delay v. Vinal*, 1 Metc. 57. But see *Piercy v. Piercy*, 19 Ind. 468; *Leach v. Prebster*, 39 Ind. 492. And the widow will not be obliged to make her election pending a controversy about the will, *Church v. Ackerman*, Saxton 40; *Pindell v. Pindell*, 40 Md. 537. If her dissent is properly executed and handed to a friend to be filed, and the widow die before it is filed, filing within the statutory time is still sufficient, *McGrath v. McGrath*, 38 Ala. 246. But where the devise already accepted passes nothing she will not be presumed to have made her election, but will be entitled to dower; however, the proof must be clear, *Chew v. Farmers' Bank*, 9 Gill 361. And where the widow held testator's property for eleven years, under a provision in the will giving her a life estate therein, it was held that she was not entitled to

dower also, and that her conduct sufficiently indicated her election to take under the will, *Caston v. Caston*, 2 Rich. Eq. 1. Election, however made, must be with full knowledge of the facts, *Story Eq. Jur.*, § 1098; *United States v. Duncan*, 4 McLean C. C. 99; *Tomlin v. Jayne*, 14 B. Mon. 162; *Duncan v. Duncan*, 2 Yeates 302; *Kreiser's Appeal*, 69 Penna. St. 194; *Anderson's Appeal*, 36 Penna. St. 476; *Macknet v. Macknet*, 2 Stew. (N. J.) 54; *English v. English*, 2 Gr. Ch. (N. J.) 504; *Dabney v. Bailey*, 42 Ga. 521; *Leach v. Prebster*, 39 Ind. 492; *Wilbanks v. Wilbanks*, 18 Ill. 17; and with full mental capacity, *Brown v. Hodgdon*, 31 Me. 65. In *Bradford v. Kents*, 43 Penna. St. 474, *Strong, J.*, says it must be "with knowledge of the particular rights as well as the circumstances of the case." And in *Tooke v. Hardeman*, 7 Ga. 20, *Warner, J.*, says she must have been "cognizant of her rights and acted accordingly." As to setting aside an election for mistake or fraud, see note 1 to this chapter. An election by matter *in pais* must not only be made understandingly, but with clear intention of doing so, *Dickinson v. Dickinson*, 61 Penna. St. 405; *Duncan v. Duncan*, 2 Yeates 302; *Leinaweaver v. Stoeve*, 1 Watts & S. 160, mere acceptance of distributive share not being held to be an election; *Anderson's Appeal*, 36 Penna. St. 476; *Pratt v. Felton*, 4 Cush. 174. And such intention will not be presumed from the widow's remaining five months after probate in the testator's house, without making claim, *Phelps v. Phelps*, 20 Pick. 556. The intention, however, of itself is insufficient—there must be some act, *English v. English*, 2 Gr. Ch. (N. J.) 504. The widow's capacity to elect by deed of renunciation, when once executed, cannot be

upon to elect and entering into the receipt of the rents and profits of both properties, as it affords no proof of preference, cannot be held an election to take one and reject the other.](g)²⁰

denied by her or questioned by a stranger, *Young v. Young*, 1 A. K. Marsh. 562. The effect of a devise in lieu of dower is generally to bar a claim under the *homestead* law also, *Hickson v. Bryan*, 41 Ga. 620; *Meech v. Meech*, 37 Vt. 414; but not the widow's statutory *exemption*, *Sheldon v. Bliss*, 8 N. Y. 31; nor a right as *heir*, *Carder v. Commissioners of Fayette Co.*, 16 Ohio St. 353. In this case Welch, J., says (p. 367): "We hold that the election of the widow to take under the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claims as heir. She can do all or either of these, without having her election set aside. Her right to elect is the creature of statutory law, and we must look to the statutes creating it, alone, for the *estoppel* it is to work. These statutes make her election to take under the will a bar to dower, and to her distributive part of the personal estate due to her as widow, and to nothing else. A contrary reading of the statutes would, in many instances, result in the greatest injustice to her. She is *compelled* to make an election, and is only allowed *one year* for that purpose. The heirs may contest the will, or not, at their discretion, and they are allowed *two years* in which to commence the contest. The widow must complete her election within one year, and the heir must begin his contest in two years. How can the widow know, at the time of making her election, whether

there will be a contest? And if she could know that, must she, at her own peril, predetermine the rights of the parties thereto? There would be no safety to her in such a construction of the law. She might validate the will by an election, and the heirs invalidate it by a contest. It would then seem to be a will as to her, and no will as to them. On the other hand, should she decide that the will was invalid, and would be set aside, and *therefore* decline to take under it, the will might ultimately be established, and she be made to lose all benefit, however great, of its provisions in her favor. Thus an election, which was intended for the benefit of the widow, would become a means to entrap her, and would render her right uncertain and impracticable. Such is not the law. If there is no valid will, there is no valid election, and of course no *estoppel* or bar. And it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the document probated becomes or remains established as a valid 'will,' that her election can have any effect whatever; and when such is the case, the effect of the election is confined to her rights *as widow*, and cannot reach her rights as heir to property not effectually and legally disposed of by the will. The will and its devises and bequests to other persons stand unaffected by her election, either

[(g) *Padbury v. Clark*, 2 Mac. & G. 306; *Brice v. Brice*, 2 Moll. 21; but see *Worthington v. Wiginton*, 20 Beav. 67; and generally, as to what acts constitute election, see note to *Dillon v. Parker*, 1 Sw. 382; *Giddings v. Giddings*, 3 Russ. 241; *Briscoe v. Briscoe*, 1 J. & Lat. 334; *Mahon v. Morgan*, 6 Ir. Jur. 173; *Ruttledge*

v. Ruttledge, 1 Dow & Cl. 331. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris v. Watkins*, 2 K. & J. 473.]

20. See, to same effect, *Huston v. Cone*, 24 Ohio St. 11.

to take or to refuse its provisions in her favor. The whole effect, in the one case, is to destroy her rights as widow, and in the other to destroy her rights as devisee or legatee, and in their place to give her the rights of the widow of an intestate." A devise accepted in lieu of dower is subject to its proportion of testator's debts, *Bray v. Neill*, 6 C. E. Gr. (N. J.) 343; *Stevenson v. Brown*, 3 Gr. Ch. (N. J.) 503; *Briggs v. Hosford*, 22 Pick. 288; *Inge v. Boardman*, 2 Ala. 331. The effect of election not to take under the will is, as to the widow, to supersede the will and leave the intestate law to govern. A *conversion*, therefore, which is to be made by direction of the will, does not take effect as to her, *Brink v. Layton*, 2 Redf. 79; *Barnett v. Barnett*, 1 Metc. (Ky.) 254; *Hoover v. Landis*, 76 Penna. St. 354; *Armstrong v. Park*, 9 Humph. 195. As to others taking remainders or other gifts under the will, her election to renounce the will leaves them unaffected, except

by accelerating estates limited after that rejected by her, *Brown v. Hunt*, 12 Heisk. (Tenn.) 404; *Wood v. Wood*, 1 Metc. (Ky.) 512; *Allen v. Hannum*, 15 Kan. 625. And an annuity for her, charged on lands devised to another, will be discharged, by her renunciation, in favor of the devisee, *Armstrong v. Park*, 9 Humph. 195. Finally, it is held that statutes providing for renunciation by the widow, relate only to domestic wills, and that a foreign renunciation is governed by the foreign law, *Wilson v. Cox*, 49 Miss. 538; *Garland v. Rowland*, 2 Sm. & M. 636; *Slaughter v. Garland*, 40 Miss. 177. Such election is governed by the law as it existed at the testator's death, *Hinnershits v. Bernhard*, 13 Penna. St. 518; and by the *lex rei sitæ*, *Apperson v. Bolton*, 29 Ark. 418; *Cormick v. Sullivan*, 10 Wheat. 202; *Duncan v. Dick*, Walk. (Miss.) 288; *Jones v. Geroch*, 2 Jones Eq. 190; *Jones v. Jones*, 8 Gill 197; *Story Conf. Laws*, § 448, *et seq.*; 2 Scrib. on Dower 24.

*CHAPTER XV.

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS, AND AS TO
REJECTING WORDS.

Doubt is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorizing the adoption of one and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralizing and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention:¹ *Cum duo inter se pugnancia reperiuntur in testamento, ul-*

1. See 1 Redf. on Wills 443, and cases cited; Flood on Wills 495, 496. See also *Smith v. Bell*, 6 Peters 74; *Pace v. Bonner*, 27 Ala. 307; *Thrasher v. Ingram*, 32 Ala. 645; *Robert v. West*, 15 Ga. 122; *Jones v. Doe*, 1 Scam. 276; *Evans v. Hudson*, 6 Ind. 293; *Howard v. Howard*, 4 Bush 495; *Adie v. Cornwell*, 3 Mon. 279; *Hunt v. Johnson*, 10 B. Mon. 342; *Dawes v. Swan*, 4 Mass. 215; *Pratt v. Rice*, 7 Cush. 209; *Homer v. Shelton*, 2 Metc. 194; *Van Nostrand v. Moore*, 52 N. Y. 12; *Van Vechten v. Keator*, 63 N. Y. 52; *Covenhoven v. Shuler*, 2 Paige 122, where the rule is called "fanciful;" *Parks v. Parks*, 9 Paige 107; *Stickle's Appeal*, 29 Penna. St. 234; *Newbold v. Boone*, 52 Penna. St. 167; *Snively v. Stover*, 78 Penna. St. 484; *Lewis' Estate*, 3 Whart. 162;

Hollins v. Coonan, 9 Gill 62; *Pue v. Pue*, 1 Md. Ch. Dec. 382; *Fraser v. Boone*, 1 Hill Ch. (S. C.) 360; *Jones v. Paschall*, 1 Ired. Eq. 430; *Lee v. Pindle*, 12 Gill & J. 288; *Orr v. Moses*, 52 Me. 287; *Brownfield v. Wilson*, 78 Ill. 467; *Evans v. Hudson*, 6 Ind. 293; *Holdefer v. Teifel*, 51 Ind. 343. This rule is however only to be applied where the different parts of the will are clearly and irreconcilably repugnant, *Walker v. Walker*, 17 Ala. 396; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Sweet v. Chase*, 2 N. Y. 73; *Crissman v. Crissman*, 5 Ired. 498; *Baird v. Baird*, 7 Ired. Eq. 265; *Pue v. Pue*, 1 Md. Ch. Dec. 382; *Petters v. Petters*, 4 McCord 151; *Fraser v. Boone, ubi supra*; *Iglehart v. Kirwan*, 10 Md. 559; *Brownfield v. Wilson*, 78 Ill. 467; *Rountree v. Talbott*, 88 Ill. 246. In *Petters v. Petters, ubi supra*,

mum ratum est. (a) Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy: for instance, if a testator in one part of his will gives to a person an estate of inheri-

it was said by Johnson, J.: "The rule of law that where two clauses in a will are so totally repugnant to each other that they cannot both stand together, the last shall prevail, * * * is incontrovertible; but it was never intended to apply to every imaginary incompatibility which ingenuity might suggest. The salutary maxim, *ut magis valeat quam perent* would insure us to make an attempt to reconcile them before we applied the rule." In construing the clauses of a will even void clauses are to be considered, *Tucker v. Tucker*, 5 N. Y. 408; *Van Nostrand v. Moore*, 52 N. Y. 12; *Kiah v. Grenier*, 56 N. Y. 220. It is also an accepted rule that effect shall be given to a clear general intent in preference to a particular intent, *Stallworth v. Stallworth*, 5 Ala. 143; *Thrasher v. Ingram*, 32 Ala. 645; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Robert v. West*, 15 Ga. 122; *Adie v. Cornwell*, 3 Mon. 279; *Chase v. Cockerman*, 11 Gill & J. 185; *Cook v. Holmes*, 11 Mass. 528; *Watson v. Blackwood*, 50 Miss. 15; *Happock v. Tucker*, 1 Hun 132; *Earl v. Grim*, 1 Johns. Ch. 494; *Parks v. Parks*, 9 Paige 107; *Kane v. Astor*, 5 Sandf. 467; *Barheydt v. Barheydt*, 20 Wend. 576; *Hitchcock v. Hitchcock*, 35 Penna. St. 393; *Schott's Estate*, 78 Penna. St. 40; *Jones' Appeal*, 3 Grant's Cas. 169; *Bell v. Humphrey*, 8 W. Va. 1; *Pue v. Pue*, 1 Md. Ch. Dec. 382. Whether a manifest general intent can prevail over the form of a particular devise to enlarge the estate given by the latter, see *Cook v. Holmes*, 11 Mass. 528; *Barheydt v. Barheydt*, 20 Wend. 576; see, too, *Shreiner's Appeal*, 53 Penna. St. 106. The following provisions have been held

to be repugnant: a gift to the testator's widow "for her own use, benefit and disposal absolutely" and a remainder subsequently given to her son at her decease, and the latter prevailing reduced the widow's estate to one for life, *Smith v. Bell*, 6 Pet. 74. See, too, *Urlich's Appeal*, 86 Penna. St. 386, affirming *Urlich v. Merkel*, 2 W. N. C. 550. In general, however, a limitation over after a fee is held to be repugnant to the estate first granted and is itself rejected, *Flinn v. Davis*, 18 Ala. 132; *McDonald v. Walgrove*, 1 Sandf. Ch. 274; *Seibert v. Wise*, 70 Penna. St. 147; *Ramsdell v. Ramsdell*, 21 Me. 287; except it be by executory gift in case of the first taker's death without issue, *Norris v. Beye*, 13 N. Y. 273; *Trustees of Theol. Sem. v. Kellogg*, 16 N. Y. 83; *Tyson v. Blake*, 22 N. Y. 558; a provision restricting the rights of a devisee to the control and disposition of an estate devised in fee to him, *Deering v. Tucker*, 55 Me. 284; *Blackstone Bank v. Davis*, 21 Pick. 42; *Gleason v. Fayerweather*, 4 Gray 348; *Rona v. Meier*, 47 Iowa 607; *Mandlebaum v. McDonnell*, 29 Mich. 78. See, too, *Miller v. Flournoy*, 26 Ala. 724, where after a gift of slaves to the widow for life with remainder to his children, he gives the residue to his widow, declaring that she shall share the slaves with the children; also *Jones v. Doe*, 1 Scam. 276, where there was a gift to A for life with remainder to his heirs and a subsequent gift after A's death to B; or a gift to the widow *in trust only* for herself for life, *Davis v. Boggs*, 20 Ohio St. 550. But a legacy to A payable at twenty-one, and a direction to executors to pay legacies within three months after testator's death,

(a) Co. Lit. 112, b.; *Ulrich v. Litchfield*, 2 Atk. 372; *Sims v. Doughty*, 5 Ves. 243; *Constantine v. Constantine*, 6 Ves. 100; *Doe d. Leicester v. Biggs*, 2

Taunt. 109; see also *Chandless v. Price*, 3 Ves. 99; *Wykham v. Wykham*, 18 Ves. [421; *Marks v. Solomon*, 18 L. J., Ch. 234, 19 L. J., Ch. 555.]

tance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.

As in *Crone v. Odell*, (b) where a testator devised the residue of his real and personal property to his children A, B, and C, and all their younger children, their heirs, executors, administrators *and assigns, forever; so far it was a clear joint devise; but he went on to declare, that, nevertheless, his intentions were, that A should receive the entire interest or yearly produce of such part of his real or personal fortune as he (testator) intended for his (A's) younger children during his life. The testator then made a similar direction as to B and C; and he provided, that, in case any of his said three children should die, the share of such should go to the younger children of such children; if no younger children, to the survivors; and he gave the parents a power of distribution among their younger children. Lord Clare held the parents and children to be entitled jointly; but this was reversed by Lord Manners, who determined that the parents took life interests only, with a power of distribution among their younger children; which decree was affirmed in D. P.

So, in *Sherrat v. Bentley*, (c) where a testator, after bequeathing several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, *to hold to his said wife, her heirs, executors, administrators and assigns, forever.* The testator then directed that none of the legatees should be entitled until twelve months *after his wife's decease*; and, in case his wife should happen to die in his lifetime, and the before-mentioned devises and bequest to her should thereby lapse, the testator gave the estate and effects, as well real as personal, comprised therein, to S., his heirs, executors, administrators and assigns, to the use of

are not repugnant, as the intention is clear that the two directions relate to different subject matters, *Walker v. Walker*, 17 Ala. 396; *Dawes v. Swan*, 4 Mass. 215; so a gift of "all my personal property" and a separate gift to another person of "all my Z. & M. Co. stock," *Young v. McIntyre*, 3 Ohio 499; neither is a bequest of what may remain after a life estate repugnant, *Weathers v. Patterson*, 30 Ala. 404; nor a devise of the

tracts in G. "left to me by my late husband," misdescribing them as "the farm on which I now live," *Hibbard v. Hurlburt*, 10 Vt. 173.

(b) 1 Ba. & Be. 449, 3 Dow 61; see also *Roe d. James v. Avis*, 4 T. R. 605.

(c) 2 My. & K. 149. See also *In re Brooks' Will*, 2 Dr. & Sm. 362; *Gravenor v. Watkins*, L. R., 6 C. P. 500, *post* ch. XXXIII., § 5.

such persons as his wife should, in her lifetime, by writing under her hand appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A. and his (the testator's) brother-in-law's children the residue of his real and personal estates, to be equally divided amongst them, share and share alike, *at the decease of his said wife*. The heir-at-law contended, that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime; but Sir J. Leach, M. R., was of opinion that the court was not warranted in putting such a construction upon the *will, for that the testator's general intention as collected from the concluding passages in his will, was to give the wife the full enjoyment during her life only, and to give it over to the persons named afterwards; and that the words "heirs, executors, administrators and assigns," were to be rejected; and his Honor referred, as one of the grounds of his decision, to the rule, that the latter part of a will shall prevail against inconsistent expressions in the prior part of it. On appeal, Lord Brougham affirmed the decree, observing that either the testator had changed his intention and was minded to give his wife a life estate instead of the fee, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative was the one to which the rule, sanctioned by the authorities, (which he stated in detail,) led. The latter was the inference drawn, not unfairly, from the whole instrument taken together.

But in these cases it is a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition.

—but prior
devise not
necessarily
disturbed.

As in *Doe d. Amlot v. Davies*, (*d*) where a testator devised all his messuage and garden in the occupation of D., and also all that his messuage and garden wherein he then resided, both situate in P., to trustees and their heirs, upon trust to pay the rents to his wife during widowhood, and after the determination of that estate, to the use of his

(*d*) 4 M. & Wels. 599. [See also *v. Handford*, 4 Jur. (N. S.) 987, 27 L. J., *Crossman v. Bevan*, 27 Beav. 502; *Spence* Ch. 767.]

children by his said wife, equally to be divided between them and the lawful issue of their or his bodies or body, and, in default of such issue, to his nephew D. The testator immediately afterwards gave to his daughter F. a pecuniary legacy when she attained the age of twenty-one years, and the house where she then lived, after the decease of her mother or the day of intermarriage; and the testator gave to his daughter R. a legacy in like manner, and the house then in the occupation of D., after the decease of her mother or the day of her intermarriage. The two houses last referred to were those comprised in the previous devise. It was admitted that, under the first devise, the daughters would have been tenants in common in tail of the two houses, but, as the second devise clearly indicated an intention to give one of the houses to each daughter, the whole was in some degree reconciled by holding each to take an estate *for life in severalty in her own house, under the latter devise, (which contained no word of inheritance,) leaving the prior devise still to operate on the inheritance in remainder, of which it made the two daughters tenants in common in tail expectant on the estate for life of each in the respective houses.

The doctrine in question has been sometimes unsparingly applied, even where the effect of the posterior devise is not merely, (as in the two last cases) to restrict and qualify the interest conferred by the prior devise, but wholly to defeat and frustrate such prior devise. Thus, in *Ulrich v. Litchfield*, (e) where a testatrix bequeathed her real *and personal estate* to A and B equally for life, and, upon the death of A, she gave the whole estate to B in tail, with remainder over, with a few pecuniary legacies, and charged her real estate with the payment of the legacies, if the personalty should be insufficient. The testatrix then gave *all the residue of her personal estate* to her uncle C's three daughters. Lord Hardwicke held the daughters to be entitled to the residue of the personal estate, considering that the testatrix must be presumed to have altered the intention expressed in the prior part of her will.

But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt —the whole to be reconciled, if possible. to give to the whole such a construction as will render every part of it effective. (f) In the attainment of this object the local order of the limitations is disregarded, if it be possible by the transpo-

(e) 2 Atk. 372.

C. 459; *Briggs v. Penny*, 3 De G. & S.

[(f) *Langham v. Sandford*, 19 Ves. 539; *Jackson v. Forbes*, Taml. 88; *Brock-647*; *Shipperdson v. Tower*, 1 Y. & C. C. 1ebank v. Johnson, 20 Beav. 205.]

sition of them to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A in fee, and in a subsequent clause give the same lands to B for life, both parts of the will shall stand; and, in the construction of law, the devise to B shall be first, (*g*) the will being read as if the lands had been devised to B for life, with remainder to A in fee.

So where (*h*) a testator, after devising the whole of his estate to A, devises Blackacre to B, the latter devise will be read as an exception out of the first, as if he had said, "I give Black*acre to B, and, subject thereto, all my estate, or the residue of my estate, to A."

By parity of reason, where (*k*) a testator gives to B a specific fund or property at the death of A, and in a subsequent clause disposes of the whole of his property to A, the combined effect of the several clauses, as to such fund or property, is to vest it in A for life, and, after his decease, in B.

Devise qualified by subsequent disposition.

Again, (*l*) where a testator gave his real and personal estate to A, his heirs, executors and administrators, and in a subsequent part of his will gave all his property to A and B, upon trust for sale, and to pay the interest of the proceeds to A for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second. (*m*)

Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons *in fee*. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concur-

Effect of separate contradictory devises, each in fee.

(*g*) Per Anderson, Anon., Cro. El. 9; Nevill, 11 Q. B. 466.]

see also Ridout v. Dowding, 1 Atk. 419; [Plenty v. West, 6 C. B. 201; Usticke v. Peters, 4 K. & J. 437.]

(*k*) Blamire v. Geldart, 16 Ves. 314.

(*l*) Brine v. Ferrier, 7 Sim. 549.

(*h*) Cuthbert v. Lempriere, 3 M. & Sel. 158; [see also Anon., Dalison 63; Adams v. Clerke, 9 Mod. 154; Allum v. Fryer, 3 Q. B. 442; Doe d. Snape v.

(*m*) The inconsistent gifts were in fact contained in several papers supposed to be written at different times; but as they had been proved as one will, they were, of course, to be so construed.

Both take concurrently. rently. (*n*) The contrary, indeed, is laid down by Lord Coke (*o*) and other early writers, (*p*) who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord Hardwicke, though he admitted that, latterly, a different construction had prevailed. (*q*) The point underwent much discussion in *Sherrat v. Bentley*, (*r*) already stated; and Lord Brougham, after reviewing the authorities, and fully recognizing the general doctrine, which upholds the latter part of a will by the sacrifice of the former to which it was repugnant, considered that, consistently with this rule, it might be held, that, where there are two devisees in *fee of the same property, the devisees take concurrently. "If, in one part of a will," he said, "an estate is given to A, and afterwards the same testator gives the same estate to B, adding words of exclusion, as 'not to A' the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A, and then to B, unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich v. Litchfield*, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule, as laid down by Lord Coke and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation."

[It was laid down by Lord Hardwicke in *Ulrich v. Litchfield*, (*s*) that the two devisees, if they take concurrently, are joint tenants; this is supported by several old authorities, (*t*) and appears to have been assumed by Lord Brougham, who speaks of their joint estate. (*u*) When he speaks (as above) of each taking a "moiety," it is only as opposed to either taking the whole to the exclusion of the other. In *Ridout v. Pain*, (*x*) Lord

Whether as joint tenants or tenants in common.

(*n*) 3 Leon. 11, pl. 27; 8 Vin. Abr., Copyh., 152, pl. 3; Arg. in *Coke v. Bullock*, Cro. Jac. 49, and in *Fane v. Fane*, 1 Vern. 30.

(*o*) Co. Lit. 112.

(*p*) Plow. 541.

(*q*) See *Ulrich v. Litchfield*, 2 Atk. 374.

(*r*) 2 My. & K. 165, *ante* p. *473.

[*s*] 2 Atk. 372.

(*t*) 14 Vin. Ab. 485, pl. 2; Anon., Cro. El. 9; Wallop v. Darby, Yelv. 210; Co. Lit. 21 a, n. (4.)

(*u*) 2 My. & K. 166.

(*x*) 3 Atk. 493.

Hardwicke says, that “latterly such a devise has been construed either a joint tenancy or tenancy in common, according to the limitation;” and this it is said must be presumed to mean, “that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint tenancy, the devisees shall be joint tenants, but otherwise shall be tenants in common.” (y) Now, as both devisees are supposed to have vested estates in fee, this interpretation points to their being joint tenants. Independently of authority this seems the] preferable construction, as less violence is thereby done to the testator’s language than by making them tenants in common, as the creation of a tenancy in common requires positive intention.

It is observable that both Lord Hardwicke and Lord Brougham considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion is attended with diffi*culty, for though, certainly, it may seem rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of gift?

Whether doctrine applies to an indivisible chattel.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator’s lifetime, the intention being, it is considered, to provide a substituted devise in the case of lapse; (z) [or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it.] (a)

Apparent inconsistency reconciled by reference to lapse.

The anxiety of the courts to adopt such a construction as will reconcile and give effect to all parts of a will is further exemplified by *Holdfast d. Hitchcock v. Pardoe*, (b) where a testator devised to A a farm in the occupation of C, and to B lands in L. marsh; and it appeared that part of the farm in the occupation of C consisted of lands in L. marsh; but there was another estate, not in his occupation, consisting entirely of marsh lands in L.; and it

Instances of devises reconciled.

(y) Co. Lit. 112 b, n. (1), by Harg.]

[(a) *Ley v. Ley*, 2 M. & Gr. 780.]

(z) *Clayton v. Lowe*, 5 B. & Ald. 536;

(b) 2 W. Bl. 975; see also *Woolcomb*

but see remarks on this case *post* ch. *v. Woolcomb*, 3 P. W. 111.

was held, that the subsequent devise was not, as contended, a revocation of the preceding devise, but that A took the farm, and B the marsh lands not included in that farm.

[So, where (c) a testator devised to A "her heirs, executors and administrators," a house in T. street, (describing it,) and in distinct clauses gave her several other houses, "the whole of which *premises* were in the borough of Plymouth, during her natural life," but should A have children, "the before-mentioned houses" to descend to them; but if she should die without issue, (which happened,) then the "said premises" to become the joint property of the children of X. The house included in the first devise being, as well as all the rest, in the borough of Plymouth, it was contended that it went with them to the children of X. But it was held, that although the words were not perfectly accurate, yet they could not intend that the testator meant by the subsequent words to cut down the estate in fee first given.]

*But, perhaps, the strongest authority of this kind is *Bettison v. Richards*, (d) where a testator, after devising an estate *pur autre vie*, devised *all other his estates*, real and personal, *wheresoever situate*, unto E. L., her heirs, executors, &c., forever, charged with debts and certain legacies; and in case his son should die without issue of his body lawfully begotten, then he devised all his manors, messuages, tenements and real estate *not thereinbefore disposed of*, situate in the several counties of H., G., N., L., and D., and the town of N., (though, it will be observed, he had previously disposed of *all* his real and personal estate,) and also all his personal property in the public funds or elsewhere, unto the said E. L. during her life, and after her decease unto R. S. in fee. It appeared that the testator had the reversion in fee expectant on the determination of an estate tail male in his son, in large estates in the several counties specified, except D. and the town of N., where he had lands in fee simple in possession. It was contended, that the latter devise was confined to the lands in the specified counties, *of which the testator had the reversion only*; and that the other lands *even in the counties particularized in the second devise*, passed under the first devise; and of this opinion appears to have been the Court of C. P., which certified that E. L. took an estate in fee in the lands *in D. and the town of N.*, subject to the debts, &c.

[(c) *Doe d. Bailey v. Sloggett*, 5 Exch. 107.] (d) 7 Taunt. 105.

[These cases also exemplify a rule which is certainly not of less frequent application than that enunciated at the beginning of this chapter, viz., that where there is a clear gift in a will it cannot afterwards be cut down except by something which with reasonable certainty indicates the intention of the testator to cut it down. It need not (as sometimes stated) be equally clear with the gift. "You are not to institute a comparison between the two clauses as to lucidity." (e) But the clearly-expressed gift naturally requires something unequivocal to show that it does not mean what it says.

Clear gift not cut down by doubtful expressions.

It is clear that words and passages in a will, which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the *rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein. (f)²

Rule as to the rejection of words.

Thus, in *Boon v. Cornforth*, (g) where a testor bequeathed the interest of £6000 stock to his daughter for life, and after her decease, upon trust to dispose of the principal and interest to and between her husband and his (testator's) daughter's child and children, viz., her husband should have and enjoy one-half of the interest thereof for and during his natural life, *if there should be no child or children*, (the words in italics were interlined,) (h)

Passage at variance with context rejected.

[(e) Per Lord Campbell, *Randfield v. Randfield*, 8 H. L. Cas. 225, where the rule was held inapplicable. For further instances of the application of the rule, see *Clavering v. Ellison*, 3 Drew. 451, 26 L. J., Ch. 335; *In re Larkin*, 2 Jur. (N. S.) 229; *Davis v. Bennet*, 30 Beav. 226; *Walmsley v. Foxhall*, 1 D., J. & S. 605; *Kerr v. Clinton*, L. R., 8 Eq. 462; *Crozier v. Crozier*, L. R., 15 Eq. 282.

(f) See per K. Bruce, L. J., 3 De G. & J. 266, 267.]

2. And if a word have no meaning, or is absurd or repugnant to the manifest intention as gathered from other parts of

the will, it may be regarded as surplusage, or it may be restricted in its application. *Estate of Wood*, 36 Cal. 75, 81; *Bartlet v. King*, 12 Mass. 536, 542; *Wright v. Denn*, 10 Wheat. 204, 239.

(g) 2 Ves. 277; [*Jones v. Price*, 11 Sim. 557; *Aspinall v. Andus*, 7 M. & Gr. 912; *Hanbury v. Tyrell*, 21 Beav. 322 (case on a deed); *Campbell v. Bouskell*, 27 Beav. 325 ("aforesaid nephews," "aforesaid" rejected); *Smith v. Crabtree*, 6 Ch. D. 591 ("Living at the death or second marriage of my wife" rejected).]

(h) *Lunn v. Osborne*, 7 Sim. 56, affords another instance of the rejection of words

and the child or children the other half; on his death his half should go to the child or children, but till the child or children attained twenty-one the husband should have the whole interest, and on the death of their father, they should have the remaining £3000; but if no such child or children at the time of her death, or they should die before twenty-one, then to go on further trust as he should thereafter mention—Lord Hardwicke rejected the interlined words, as inconsistent and repugnant with the whole disposition; holding that there was no alternative but to reject either these or the entire provision.

So in *Coryton v. Helyar*, (*i*) where a testator devised lands to the use of his son *for ninety-nine years*, and, after the determination of that estate, to the use of trustees during the life of the son, to preserve contingent remainders; and, after the decease of the son, to the use of his first and other sons in tail male—Lord Hardwicke held, that the term was, with reference to the true construction of the several parts of the will, to be construed, not as an absolute term, but as determinable with the decease of the son.

In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

Thus, where (*j*) the devise was to A and her heirs, *for their *lives*, Lord Ellenborough rejected the latter words; which, he said, were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs might take, they could in fact only enjoy the benefit of it for their own lives. [And where (*k*) a testator gave to his wife, her heirs and assigns forever, his house and other property, with the intention that she might enjoy the same *during her life*, and by her will dispose of the same as she thought proper; it was contended that the wife took only a life interest with a testamentary power of appointment; but the court held, that the latter part of the clause did not cut down the clear gift of a fee-simple contained in the former part, and that the

Ambiguous words inconsistent with prior devise rejected.

which had been interlined by a testator, and were at variance with the general context.

(*i*) 2 Cox 340. [See, for other examples of powers or interests reduced within a limited period by force of the context, *Watlington v. Waldron*, 4 D., M. & G. 259; *Chapman v. Gilbert*, Id. 366.]

(*j*) *Doe d. Elton v. Stenlake*, 12 East 515. [See also *Towns v. Wentworth*, 11 Moo. P. C. C. 545; *Hugo v. Williams*, L. R., 14 Eq. 224.

(*k*) *Doe d. Herbert v. Thomas*, 3 Ad. & Ell. 123, 4 Nev. & M. 696. See also *Brocklebank v. Johnson*, 20 Beav. 205; *Pasmore v. Huggins*, 21 Beav. 103.]

testator merely meant to mention all the incidents of a fee which occurred to him at the time.]

So, where (l) a testatrix bequeathed an annuity, to be equally divided between M. B., C. S., and C. A., "to them and their heirs, or the survivor of them, *in the order they are now mentioned*," Sir W. Grant rejected the latter words as repugnant. "The proposition," said he, "equally to divide a fund between two persons in a given order is mere nonsense, directly repugnant. There can be no division if there is an order in which they are to take. Suppose it stood simply a bequest to be equally divided between A and B, in the order they are mentioned, the court could only say the first words are plain, importing equal division, a benefit, and a personal benefit to both; and they do not know what meaning to put upon the other words: they are insensible, as coupled with such preceding words. The only question therefore is, whether words having a plain meaning are to be rejected for the sake of words of which you do not see the sense or meaning. It is very probable the testatrix might have had in her mind some vague, indefinite notion of preference, but that is not expressed in any manner, so that the court can act upon it; not even by saying the words importing equal division are to be coupled with the original annuitants and not with the survivors. Those words must be equally applied to all the persons who are to take, or they must be equally rejected. It is to be equally divided among the three; not a different division among the survivors. In order to give effect to the latter words, I should be under the necessity of rejecting the words expressing an equal division, retaining the others with reference to one event, and of doing the reverse in reference to another event. In the event of all living, I should have kept the former and rejected the latter words; but in the event of two surviving, I am to reject the former and preserve the latter. There is no ground for such a capricious rejection of words to suit the event. The testatrix has not pointed out the specific event in her contemplation, or showed a different intention as to the accruing parts and the whole; and this order to take place is so obscurely expressed, that it is utterly impossible for me to give any effect to it."

[The embarrassment often caused by cases of this description is exem-

(l) *Smith v. Pybus*, 9 Ves. 566; see *ch. XXXVII.*, § 2; and *Reece v. Steel*, 2 also *Jesson v. Wright*, 2 Bligh 1, and *Sim.* 233; *Townley v. Bolton*, 1 My. & other cases of the same class discussed, *K.* 148; [*Harvey v. Harvey*, 5 Beav. 134.

plified by *Morrall v. Sutton*, (*m*) where a testator limited life interests in his leasehold property charged with certain annuities, with remainder to S. C., "her executors, administrators and assigns, subject to the said annuities charged thereon during her natural life." The general rules above mentioned were acknowledged on all hands; but there was a difference of opinion upon the question, whether or not sufficient evidence of the testator's intention could be collected from the context to authorize the rejection of the words "during her natural life," so as to give S. C. the absolute interest; for, in the absence of such evidence, those words being placed last must, according to the general rule, overrule the preceding words "executors, &c.," thereby limiting S. C.'s interest to a life-estate. Coleridge, J., in a valuable judgment, supported the affirmative against the opinions of Parke, B., (who, with Coleridge, J., assisted the L. C. upon the appeal,) and of Lord Langdale, M. R., from whom the appeal was brought. The case was ultimately compromised.

But words are not to be expunged upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence.

Thus, where (*n*) a testator after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estates "to the use of *the said* Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of *the said Thomas Brailsford, son of my nephew Samuel Brailsford*, his heirs and assigns, forever." The only Thomas Brailsford mentioned in the will was the son *of Samuel, but the testator had another nephew of that name, (who was uncle of the legatee,) to whom, therefore, it was contended, that the devise to "*the said* Thomas Brailsford," applied, though he was not before named, according to the case in *Hawkins*, (*o*) that father and son having the same name, the son, not the father, is distinguished by an addition. (*p*) The words "the said," it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or, there must be an inquiry. But Sir W. Grant said, that it was impossible to contend that there was, *prima facie*, any ambiguity in the description; by the words,

(*m*) 4 Beav. 478, 1 Phil. 533.]

(*o*) 2 Hawk. P. C. 271, § 106.

(*n*) *Chambers v. Brailsford*, 18 Ves. 368; [and see *Mellish v. Mellish*, 4 Ves. 48.]

(*p*) See also *Goodright d. Hall v. Hall*,

1 Wils. 148.

“the said Thomas Brailsford,” the Thomas Brailsford who had been before mentioned was sufficiently described. “The argument on the other side,” he said, “rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; *but the devise as it stands is not so insensible or contradictory as to drive the court to the necessity of expunging or adding words to give it a meaning;*” and this decree was affirmed by Lord Eldon. (g)

And though *repugnant* expressions will yield to an intention and purpose expressed or apparent upon the general context, yet it does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear. (r) Thus, where (s) a testator expressed his conviction of the honor and justice of his trustees, and made that conviction the ground of his reposing in them the trust of distributing his property among his relations, authorizing them to fix both the objects and the proportions, but afterwards gave the power in express terms, to them, *and the heirs, executors and administrators of the survivor of them*—Sir W. Grant, M. R., observed, “Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will, upon the supposition, though not impro*bable, that they were introduced in this part by inadvertence or mistake.”

Devise not controlled by reason assigned.

[Again, it is a general rule, that a devise in general terms shall not, even though otherwise inoperative, be held to control another devise made in distinct terms. Thus, in *Borrell v. Haigh*, (t) where a testatrix devised all her messuages, cottages, closes, lands and hereditaments at H. to A, and afterwards gave all her copyhold estates and hereditaments at N. and T. and *elsewhere*; and it appeared that the only place besides N. and T., in

Devise in general terms will not control another distinct devise.

(g) 19 Ves. 652, 2 Mer. 25; see also *Roe v. Foster*, 9 East 405; [*Ridgeway v. Munkittrick*, 1 D. & War. 90, 91; *Ridout v. Pain*, 3 Atk. 493; *Langley v. Thomas*, 6 D., M. & G. 645.] see 4 Ves. 808; *Thompson v. Whitelock*, 5 Jur. (N. S.) 991.] (s) *Cole v. Wade*, 16 Ves. 27. [(t) 2 Jur. 229. See also *Sidebotham v. Watson*, 11 Hare 170 (4th question).

(r) Per Sir W. Grant, 16 Ves. 46; [and

which the testatrix had copyholds, was H. : Lord Langdale, M. R., held, nevertheless, that the prior devise, which *per se* clearly carried the copyholds at H., was not defeated by the vague expression which followed.

So in *Greenwood v. Sutcliffe*, (u) where a testator devised his estate called S., in trust for his daughter Anna for life, and at her death the trustees were to stand seized thereof, "and also of all accruing share and interest to which she might become entitled by survivorship under the trusts of his will or otherwise," to the use of her children as tenants in common in fee. And the testator devised another estate, called R., to trustees to hold in trust for his daughter Maria, for life; and after her death, (in the events which happened,) to stand seized thereof to the use of the testator's son William and his said daughter Anna, or such of them as should be then living, their heirs and assigns in equal shares. Maria died before the testator; and upon the death of Anna, who survived her father and sister, her children claimed the R. estate under the words contained in the former part of the will, "all accruing share," &c., on the ground that the effect of them was, in the events which had happened, to limit the R. estate, after the death of Anna, to her children. But it was held, that the direct and express limitation of the R. estate to William and Anna, and their heirs and assigns, as tenants in common, was not controlled by the words in question, although no other operation could be attributed to them.]

It is to be observed, too, that a devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

*Thus, where (x) a testatrix devised lands to her eldest daughter A. S., and the heirs of her body forever, with remainder over, charged with a sum of money to be raised out of the yearly profits; and the testatrix declared it to be her will that her executors (thereinafter named) should stand seized of the lands until they should have raised the said sum, or until the same should be discharged by A. S. and her

(u) 14 C. B. 226.]

(x) Doe d. Hanson v. Fyldes, Cowp. 833.

heirs; and after the raising or payment thereof by the said A. S. or her heirs, then that A. S. and her heirs should enjoy the said lands forever. (y) It was held that the word "heirs" (of A. S.,) thrice repeated, referred to the special designation of heirs to whom the estate was devised in the beginning of the will, and were not intended to introduce a new and more general denomination of heirs, and to revoke the express estate tail given in the beginning of the will.

So, where (z) the devise was to A and the heirs *male* of his body, and, in case he should die *without issue*, then over, the words "without issue" were held to mean without issue *male*.

Both the preceding cases exhibit deficiency, rather than repugnancy of expression, and will serve, therefore, not inaptly to conduct to the commencing subject of the next chapter.

(y) The words "for ever" were not strictly repugnant, as an estate tail is capable of perpetuity of duration. 50, 1 And. 8; [see also *Ellicombe v. Gompertz*, 3 My. & Cr. 127; *Hillersdon v. Lowe*, 2 Hare 355; *Mortimer v. Hart-*

(z) *Tuck v. Frencham*, Moore 13, pl. ley, 3 De G. & S. 332.]

*CHAPTER XVI.

AS TO SUPPLYING, TRANSPOSING AND CHANGING WORDS.

I. *As to supplying words.*—It is established that [where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, (a) those words] may be supplied, in order to effectuate the intention, as collected from the context.¹ Of this we have a very simple example in an early case, where a devise to A and the

Words may
be supplied,
when.

"Without is-
sue" supplied.

[(a) See *Hope v. Potter*, 3 K. & J. 206; per K. Bruce, L. J., 3 De G. & J. 266, 267.]

1. Words are to be supplied only when the intention of the testator is clear and the words necessary to his meaning. There must be either "1st. Some ambiguity or absurdity on the face of the will ascribable to something omitted, or 2nd. Manifest and convincing proof that the omission was contrary to the intention of the testator." Wms. Ex'rs. See *Cleland v. Waters*, *infra*. See also Wms. Ex'rs (6th Am. ed.) 1162; 1 Redf. on Wills 454; *Kellogg v. Mix*, 37 Conn. 243; *Cleland v. Waters*, 16 Ga. 507; *Hunt v. Johnson*, 10 B. Mon. 344; *Den v. Combs*, 3 Harr. (N. J.) 27; *Creveling v. Jones*, 1 Zab. 573; *Drake v. Pell*, 3 Edw. 251; *Coster v. Bloodgood*, 3 Sandf. Ch. 293; *Cowenhoven v. Shuler*, 2 Paige 122; *Pond v. Bergh*, 10 Paige 140; *McKeehan v. Wilson*, 53 Penna. St. 74; *Theobald on Wills* 427; *Hawkins on Wills* 5; *Jackson v. Hoover*, 26 Ind. 511; *Grimes v. Harmon*, 35 Ind. 198; *State v. Joyce*, 48 Ind. 310; *Pickering v. Langdon*, 22 Me. 413, 429; *Dew v. Barnes*, 1 Jones Eq. 149; *Wooton v. Redd*, 12 Gratt. 196; *Bishop v. Morgan*, 82 Ill. 351, 354. Instances of

supplying words under the foregoing rule, are as follows, the word which is in italics being supplied in the construction: *Couch v. Gorham*, 1 Conn. 39, "if either of my sons *die* without issue," over; so, too, *Lynch v. Hill*, 6 Munf. 114; "after paying my debts I give to my beloved wife *the net income of my estate* in trust for the maintenance" of herself and family, the testator having previously given his whole estate, with an income of about \$4000, to trustees, and directed them to pay his son A \$400 per annum and having made no disposition of the rest, *Kellogg v. Mix*, 37 Conn. 243; to widow for life or widowhood, "but should she marry again *or when she dies*," over, *Aulick v. Wallace*, 12 Bush 533; so, an ellipsis "*should she decline doing so*" was supplied in *Barclay v. Dupray*, 6 B. Mon. 98; "all those two lots," *Cresswell v. Lawson*, 7 Gill & J. 227; bequest to A "during her natural life," *Geiger v. Brown*, 4 McCord 418; to widow "during her widowhood *or until my children become of lawful age*," *Reid v. Hancock*, 10 Humph. 368; "pay five hundred dollars to my brother N. S.'s children," *Sessoms v. Sessoms*, 2 Dev. & B. Eq. 453. See too *Zerbe v. Zerbe*, 84 Penna. St. 147. "Another settled rule of construction," in the language of Stiles, C. J.,

heirs of his body, and, if he should die, then over, was read "and if he should die *without issue*." (b)²

So, where (c) a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and declared that if John *died*, living Alice, William should be his heir. And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should be his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should be to the children of his brother. John died in the lifetime of Alice, leaving a son; and the court held, that, upon the whole context of the will, the construction should be "if John died *without issue*, living Alice;" and that this was the intent appeared, it was said, by other parts of the will, the other sons having other lands to them and the heirs of their bodies; and that if they all died without issue, it should be to his brother's children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

"is that when a testator in the disposal of his property overlooks a particular event which, had it occurred to him, he would probably have guarded against, the omission will not be supplied by employing or inserting the necessary clause, for as it is said 'it would be too much like making a will for the testator rather than construing that already made,' and though the inference of intention be more or less strong, yet, if not necessary or indubitable, the court will not for the same reason aid the supposed intention by adding or supplying words," *Augustus v. Seabolt*, 3 Metc. (Ky.) 156. And in this case there being a gift to the widow for life or widowhood and on her death to A, A was not permitted to take on her remarriage. And where the testator names A, B and C, trustees and executors, and after A's death by a codicil appoints D to be "executor in his place" the words "*and trustee*" will not be supplied after "executor," *Murgitroyd's Estate*, 1 Brewst. 317

(b) *Anon.*, 1 And. 33; see also *Atkins v. Atkins*, Cro. El. 248.

2. In *Den v. Combs*, 3 Harr. (N. J.) 27, a limitation over "if B should die" was completed by supplying "*without issue and under age*;" and in *Liston v. Jenkins*, 2 W. Va. 62, "*without issue*." But in *Butterfield v. Hamant*, 105 Mass. 338, the court refused to supply as an omission after "provided he should not outlive his father" the words "*and leave no issue surviving his father*"—so, to supply the words *without issue*, after a limitation for life to testator's widow and children, and to the widow if the children "die before" her, *McKeehan v. Wilson*, 53 Penna. St. 74— or in a devise to two with limitation to the survivor "in case of the death of either of them," *Hamilton v. Boyles*, 1 Brevard 414; or to charge an annuity referred to as charged but not charged, *Varner's Appeal*, 87 Penna. St. 422.

(c) *Spalding v. Spalding*, Cro. Car. 185.

And in several instances where a testator, in a will made before the year 1838, has used the phrase "without *leaving* issue" "Without issue," read "without leaving issue." *and "without issue" indifferently, in bequests of *personalty*, in regard to which alone (as hereafter shown) the difference of expression is material, the word "leaving" has been supplied, in order to produce uniformity, which, it was considered, must have been intended.

Thus, in *Shepperd v. Lessingham*, (d) where A, having two children, F. and M., bequeathed certain stock, in trust, as to one moiety, for F. for life, remainder to such child or children of F. as should be living at his decease; and, if he should not leave any child, or in case such children should die without issue, then to M. for life, remainder to such child or children of M. as she should have at the time of her death; and in case M. should leave no issue living at her death, or if such child or children as she should so leave should die *without leaving any issue*, then to J. S.; and, as to the other moiety, the testatrix appointed the interest to be paid to M. for life, remainder to such child or children as she should leave at her decease; and in case M. should leave no such child or children, or all such child or children as she should leave should die *without issue*, then to F. for life, remainder to his children living at his decease; and in case F. should leave no child or children, or they should die without issue, then to J. S. the same as the other moiety—Lord Hardwicke was of opinion that the same construction was to be put on the words "without issue," in the bequest over of the second moiety to F., as on the words "without *leaving* issue," in the other moiety; (e) the only difference intended in the disposition of the two moieties evidently being to prefer F. as to one moiety, and M. as to the other. The consequence was, that these words, being used in relation to personal estate, referred to issue at the death. (f)

Again, in *Kirkpatrick v. Kilpatrick*, (g) where a sum of money was bequeathed to J. and S. to be equally divided; but in the event of the death of either of them *before he attained* Words "under twenty-one" supplied.

(d) Amb. 122. See also *Radford v. Radford*, 1 Kee. 486, where freeholds and leaseholds were combined in the same devise. [Cf. *Pye v. Linwood*, 6 Jur. 618, stated *post* ch. XLI., § 1, n.]

(e) But the word "leaving" occurred in the *ulterior* bequest of the other moiety.

(f) Even with this construction, the gift over, in the event of the children not leaving issue, was too remote, as M. might have had children born *after the death of the testator*.

(g) 13 Ves. 476; [see also *Wheable v. Withers*, 16 Sim. 505. But see *Else v.*

the age of twenty-one years, and without issue, his share to go to the survivor; but in the event of both dying *without issue*, then over; *Lord Erskine, on the authority of the last case, supplied the words "under twenty-one," in the ulterior bequest.³

[The case of *Lang v. Pugh* (*h*) was of the same kind. A testator gave a sum of money, in trust for his son T. for life, and after his death for his lawful issue if then of age or married, equally if more than one, if only one the whole to go to such only child; or in case such child or children of his son should be under age at the death of the son, then "to be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of twenty-one years, if sons, or if daughters, on their marriage respectively." Sir K. Bruce, V. C., read the will as if it had been written, "or, in the case of daughters *marrying earlier*, upon marriage;" he thought it improbable that the testator could "have meant a daughter of T. surviving her father, and having attained majority in her father's lifetime, to take the fund or a portion of it absolutely, though never married, but that he meant altogether to exclude any daughter, a minor at her father's death, if not then married, unless she should at some period of her life marry."

"On marriage" read "at twenty-one or marriage."

Again, in the leading case of *Abbott v. Middleton* (*i*) a testator gave an annuity of £2000 to his wife for life, and directed funds to be set apart for securing it, "and on her decease the sums provided and set apart for such payment to become the property of my son A so far as he the said A my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters" B, C and D. The son A having died before his mother but leaving a

"Dying" read "dying without leaving a child."

Else, L. R., 13 Eq. 196. In *Radley v. Lees*, 3 M. & Gr. 327, the codicil showed that the testator's intention would be defeated by supplying the words there proposed to be inserted in the will.]

3. See, too, *Wurts v. Page*, 4 C. E. Gr. (N. J.) 356, where "*under twenty-one*" was supplied after "die without issue." This case followed that of *Pennington v. Van Houton*, 4 Halst. Ch. 272, affirmed Id. 745,

where the devise was to A, in trust until he should attain twenty-one, and "if he die without issue," over. And see *Den v. Combs*, 3 Harr. (N. J.) 27, above cited.

[(*h*) 1 Y. & C. C. C. 718; see also *King v. Cullen*, 2 De G. & S. 252; *Woodburne v. Woodburne*, 3 Id. 643.

(*i*) 21 Beav. 143, 7 H. L. Cas. 68. And see *Brotherton v. Bury*, 18 Beav. 65.

child, the question was, whether the words "without leaving any child" could be supplied after the word "dying" in the final gift over, so as to leave the child of A in possession of the property, and it was held by Sir J. Romilly, M. R., that those words must be supplied. Referring to *Spalding v. Spalding*, (*k*) he said the principal ground of the decision there seemed to him to be the expression of the testator's intention that the heirs of the body of the first son should take, and it was *to be observed that they could take only by descent through the father, whereas in the present case they took vested interests direct from the testator. The judgment of the M. R. was affirmed in D. P., principally on the same ground. (*l*) A clear gift was not to be divested but by an unmistakable provision to that effect. (*m*)

In the foregoing cases the testator had used expressions that were, or were considered to be, plainly elliptical. Some contingency or state of circumstances that was present to his mind was imperfectly described. But the court cannot provide for an event which appears to have been absent from the testator's mind, however strange the omission may be. Thus in *Eastwood v. Lockwood*, (*n*) where a testator disposed of all his property on trusts for the maintenance of his children until Hannah, the youngest, attained twenty-one; and as soon as she attained that age he disposed of his personal estate among certain of his children; and as to a specified part of his real estate, he devised it to his son A in tail male, subject to a certain charge; and as to other specified parts, he devised one to each of his other sons in tail male, with a gift over "in case any of his said sons should die during the minority of Hannah, or in the event of any of them dying without such lawful issue as aforesaid, and either before or after their or his share should be divisible according to the provisions of the will" (*i. e.*, before Hannah attained twenty-one); A died before that time leaving issue, and it was argued, on the authority of *Spalding v. Spalding*, (*o*) that his estate was not cut down. Sir W. P. Wood, V. C., agreed that the

(*k*) *Ante* p. *486.

(*l*) By Lords Chelmsford and St. Leonards; Lords Cranworth and Wensleydale diss. Whether the words were supplied or not the will remained incomplete. If they were not supplied, the testator's bounty to his grandchildren would depend on their father's surviving his

mother, which appeared unreasonable. If they were supplied, and the son survived his mother and died leaving no child, the fund would not go to the children of the daughters but would fall into the residue.

(*m*) See *Hope v. Potter*, 3 K. & J. 206.]

(*n*) L. R., 3 Eq. 487.

(*o*) *Ante* p. *486.

words "in case of any son dying during the minority of Hannah" standing alone would have brought the case within that authority: but the words that followed made it different. The testator had put two classes of events together. He had said, "I point to a dying in the one case *simpliciter* during a given epoch. I point to a dying without issue in the other case generally, either before or after Hannah attains twenty-one." It was true that in one sense the second alternative might be included in the first, yet still it was emphatic; and although it seemed *strange to suppose that he meant it in this sense, yet if he did, he could hardly have expressed himself more clearly. Notwithstanding the existence of issue, therefore, the estate of A was divested and went over.]

The principle of supplying omitted words has been applied in numerous other cases, from which the following have been selected, as affording apt examples of its application.

Thus, where (p) a testator having two sisters, A. H. and M. J., and also two cousins, F. and G., devised his estate at A. to his sister A. H. for life, remainder to his sister M. J., for life, remainder to another person for life, remainder to F. in tail, remainder to G. in tail, with remainders over; and then devised another estate at B. "to his sister M. J. for life, *OR if she should survive his wife and sister A. H., so that she should come into possession of the estate at A.,*" then to L. J. for life, towards the support of his cousins F. and G., remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it was therefore contended that the remainder to L. J. and G. failed; but the court decided, that, as the word *or* so placed was unintelligible, being referable to no other alternative; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister M. J., and that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail after a remainder in tail to his brother F.; in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read as a gift to his sister M. J. for life, AND AFTER HER

Words supplied to provide for an alternative event, obvious, though not expressed.

(p) Doe d. Leach v. Micklem, 6 East 486; see also Webb v. Hearing, Cro. Jac. 415; Anon., 2 Vent. 363; Pearsall v. Simpson, 15 Ves. 29; Lord Eldon's judgment in Doe d. Planner v. Scudamore, 2 B. & P. 296.

DEATH, or if she should survive his wife (q) and sister A. H., so that she should come into possession of the estate at A., then over to L. J., who consequently took a vested remainder, and was entitled in the events that had happened.

But no case, probably, has gone further in supplying words in compliance with the intention appearing by the context, than Doe d. Wickham v. Turner, (r) where the testator's deficiency of *expression left the devise without an object. The will was in these words: "I give unto H. W. a messuage or tenement now in the possession of W. *Item*, I give further unto my nephew H. W. half part of my garden, and £100 stock in the 4 per cent. bank annuities. *I give, further, my yard, stables, cowhouse, and all other outhouses in the said yard*, to my sister M. W. to have the interest and profits during her life." The question was, whether the nephew was entitled to the yard under this devise. The court (Best, J., diss.,) decided in the affirmative; for as the testator had used the word "further" in the preceding part of his will, when he made an additional gift to the same devisee, and as the clause would otherwise have been senseless and inoperative, the words "to him" might be supplied, and then it was a devise to M. W. for life, remainder to her son H. W. *in fee*. (s)⁴

So, in Langston v. Pole, (t) where a testator, passing over the first son of A, (his son and devisee for life,) proceeded to limit the estate to the *second* and other sons of A in tail successively [according to seniority], and then to the first and other daughters of A in like

(q) It does not distinctly appear why the death of the wife is introduced; but probably she had a life estate in the property at A.; [or, perhaps, it was because the wife had a life annuity of £50 out of estate A; and that, therefore, M. J. was not intended to lose estate B till after the cesser of that charge upon her interest in estate A.]

(r) 2 D. & Ry. 398.

(s) There must be a mistake in this, as the will was destitute of any ground for raising a fee in the devisees, and it was not necessary for the court to determine the *quantity* of the devisee's interest.

4. So in Marsh v. Hague, 1 Edw. 174, where there was a gift to the testator's

cousin "A, daughter of my uncle B, \$1000 more than the equal part above mentioned to my uncle B's children" and an omitted gift to B's children was supplied by implication. But where there is a gift to A's children "*when they come of age or marry*" and a similar gift to B's children without those words, they will not be supplied on a mere conjecture for the purpose of realizing the gifts, Simpson v. Smith, 1 Sneed 394.

(t) 2 M. & Pay. 490, [5 Bing. 228, Tambl. 119, and in D. P. nom. Langston v. Langston, 8 Bli. 167, 2 Cl. & Fin. 194, Sugd. Law of Prop. 370. See also Newburgh v. Newburgh, Sug. Law of Prop. 367; Parker v. Tootal, 11 H. L. Cas. 143.

manner: on a case from Chancery the Court of C. B. supplied the vacancy in the series of limitations, by holding the first son to take an estate tail immediately expectant on his father's decease. [It appears that the Court of B. R. had come to an opposite conclusion upon the same will. Neither court gave reasons. The decision of the Court of C. B. was affirmed in D. P. Lord Brougham relied on the trusts of a term, which were, in case there should be only one son and one daughter, to raise a portion for the daughter; an absurd provision, if the daughter herself took the estate, as she would, under the circumstances, unless the son did. However, he was of opinion that the phrase "other sons" included the first son, and therefore the decision of the court below was right, without supplying any words. (u)]

(u) See also *Clements v. Paske*, 3 Dougl. 384, cit. 1 M. & Sel. 130, 2 Cl. & Fin. 230, n. The devise was to trustees during the life of J. C., upon trust for J. C. for life, and after his decease, to the eldest son of J. C., and for default of such issue, then likewise to the second, third, and every other son of J. C. successively, according to seniority, and the several and respective heirs male of the body and bodies of such (omitting the first son) second, third, or other son or sons, the *eldest of such sons* and the heirs male of his body being always preferred to and take before any of the younger sons and the heirs male of his body, and, in case of such issue male failing by J. C., then over. It was held in B. R. that the eldest son of J. C. took an estate tail, and not an estate for life. Lord Mansfield seems to have chiefly relied on the word "likewise," as indicating an intention that the first son should have the same estate as the younger sons, and not on the word "other" as (according to Lord Brougham's judgment in *Langston v. Langston*) he might have done. In *Owen v. Smyth*, 2 H. Bl. 594, Eyre, C. J., doubted whether words such as those which afterwards occurred in *Langston v. Langston* could, in a deed, be considered to give an estate tail to the eldest son. In *Barnacle v. Nightingale*, 14 Sim. 456, there was a devise to A for life, and, after his decease,

to his first son, and, for default of such issue, to the second, third, &c., and all and every other son and sons of A, and the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body: *Shadwell, V. C.*, decided that the limitation to the heirs of the body of the first son had been omitted, and could not be supplied, and that such son took only an estate for life. The Court of B. R. decided the direct contrary on the same will, *Doe d. Harris v. Taylor*, 10 Q. B. 718; and with the latter decision agrees *Galley v. Barrington*, 2 Bing. 387, in which, upon a settlement expressed in very similar words, the Court of C. B. held that the limitation "to the heirs of the body" included the heirs of the body of the first as well as of the second and younger sons; and *Owen v. Smyth*, 2 H. Bl. 594, where the limitations in a deed were to the use of N. for life, remainder to the use of the first son of N., and for default of such issue to the use of the second, third, and all and every other son and sons of N. successively, and of the several heirs male of the body and bodies of *all and every such son and sons*, so that the elder of such sons and the heirs male of his and their bodies should always take before the younger of the same sons and the heirs male of his and their body and

*It is clear, however, that words and even clauses, may be supplied in a set or series of limitations or trusts, from which they have been omitted without apparent design, where those limitations or trusts as they stand are inconsistent with the context, and the context shows what must be added to remove the inconsistency. (*x*) Thus, in *Greenwood v. Greenwood*, (*x*) where a testator bequeathed his real and personal estate to trustees on trust to sell and invest the sale moneys, and "pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who, being sons, shall attain twenty-one, or being daughters, shall attain that age or marry, in equal shares;" with power for the trustees, "after the death of my wife, or previously thereto if she shall so direct, to raise any part not exceeding one-half of the then expectant presumptive or vested share of any child under the trusts hereinbefore declared" for the advancement of the child; and "after the death of my wife" to apply the whole or a part "of the income of the share to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared" for maintenance of the child: and, in "default of children, "then from and after the death of my said wife and such default of children," over. The question was whether the wife had a beneficial interest for her life in the fund, and it was held by the L. JJ. that she had. Sir W. James observed that if the will had ended with the gift to the children in equal shares, it would have been difficult to alter the natural meaning of the words, which imported a gift to the wife during her life in trust for the children, giving the latter an estate *pur autre vie* only. But when they read the powers of advancement and maintenance, which were powers dealing after the death of the wife with what the testator treated as already given to the children, it was evident that the natural meaning of the previous words could not be the true one, these powers being utterly inconsistent with the view that the previous trust for children was one determining with the wife's life; they were driven therefore to separate the words in the

bodies; and it was held that the words in italics included the first son as well as the others and gave him an estate tail. It must be observed that the authority of *Doe v. Taylor* is impaired by the reasons given for the decision, viz. that the words "for default of such issue" did not, as is the universal rule, mean for default of

such issue as took under the previous limitation, that is, "for default of such first son," but meant "for default of issue of such first son," and that the first son, therefore, took an estate tail by implication. See *post* ch. XL., § 3, and *In re Arnold's Estate*, 33 Beav. 163.

(*x*) 5 Ch. D. 954.

gift to the children from the gift to the wife for life, the words "after her death" being implied after the gift of her life estate.

So in *In re Daniel's Trusts*, (y) a postnuptial settlement, reciting an intention to make further provision for children, vested a fund in trustees for the wife for life, and after her death "for all and every the child and children of the marriage who, being a son or sons, have or hath already attained or shall hereafter attain the age of twenty-one years and their respective executors and administrators; and if there shall be but one such child the whole shall be in trust for such only child and *his or her* executors or administrators," with a direction "during the minority of each of the said children" to apply the income of "the presumptive share of every such child for *his or her* maintenance until such *his or her* share should become vested, or until *he or she* should die," and a power to apply "all or any part of the expectant share of each of the said sons" for his preferment or advancement. There were several sons and daughters, all of whom had attained twenty-one. It was held by Sir G. Jessel, M. R., that sons only were entitled. But on appeal it was held that daughters also were by implication entitled to participate. The L. JJ. thought that the recital and the use of the words "his or her" and "he or she" gave abundant evidence of an intention to provide for children both male and female. Sir W. James said: "These words are part of a common form, and we *must deal with the case as if the words had run 'for all and every the child and children who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters, ———; and if there shall be but one such child, then the whole shall be in trust for such one or only child.' The only question then would be what is to be supplied; and as maintenance is given during minority, I should have no difficulty in supplying 'attain twenty-one.'" It is presumed that the L. J. did not mean that this was the only qualification intended as to daughters, for no one ever saw a "common form" of trust for "children who being sons attain twenty-one, or being daughters attain twenty-one." As all the daughters had attained twenty-one, and were thus entitled at all events, it was unnecessary to say what other qualification was intended. But this drops the common form theory.

Again, in *Sweeting v. Prideaux*, (z) where a testator bequeathed

(y) 1 Ch. D. 375.

(z) 2 Ch. D. 413. And see note on limitations by reference, ch. XXII., § 6.

£16,000 in trust to pay the income of one moiety to his daughter A for life for her separate use, and after her death to divide that moiety among her children, or failing children among her statutory next of kin; and to pay the income of the other moiety to his daughter B for life "in the same manner in every respect, and subject to the same control as he had before directed as to A, it being his intention that his said daughters' fortunes should not be subject to the control of their husbands." He then gave £6000 in trust for his son C for life, and after his death for his children and failing children to form part of his estate; and he empowered the trustees to apply the income of the £16,000 and £6000 for the maintenance of his said daughters' or son's children as they might think proper. B died leaving children, and it was held by Sir C. Hall, V. C., that they were by implication entitled to the moiety given to B for life. He said: "The daughters were treated collectively, it being his intention that their 'fortunes' should be alike, and the income was not only given to them but there was a provision for maintenance of his 'said daughters' and son's children.' There was a separate provision for the heads of the three families."

So where (a) a testator gave his real and personal estate (which he directed to be sold and converted) in trust as to one-seventh for one son, and as to another for the other son. And he *directed his trustees to hold the remaining five-sevenths in trust to pay the income to his daughters A, B, C, D and E in equal shares during their lives; and after the death of A, in trust as to one-fifth for the children of A; and after the death of B, in trust as to another fifth for the children of B; and after the death of C, in trust as to another fifth *for the children of D*; and after the death of E, in trust as to another fifth for the children of E, with power for the trustees "until *the share* of the issue of any of his said daughters should become payable" to invest the same, and apply the income for the maintenance of such issue; it was held by Sir J. Bacon, V. C., that a trust must be implied after the death of C for the children of C. He observed that the testator was making an equal division of his estate among his seven children, but that unless this trust was implied he would die intestate as to one-seventh: could he impute such an intention to the testator on reading the whole will, and looking especially to the provision for maintenance

(a) In re Redfern, 6 Ch. D. 133.]

[*495]

of the issue—"that is to say (added the V. C.) *the issue of the five daughters?*""]

But it is not to be inferred from any of the preceding cases, that words may be inserted upon mere conjecture, in order to equalize estates created by several distinct and independent devises, in favor of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be *conjectured* that he had the same intention as to all.

Words of limitation used in one devise, not to be applied to a distinct devise.

Thus, where (b) a testator, having three sons, T., F., and H., devised lands to T. and the heirs male of his body, remainder to F. and his heirs. *Item*, he devised his house in H. to F. and the male heirs of his body, remainder to H. and the heirs male of his body; *Item*, he gave to H. and his heirs freely another house; *Item*, he gave to his said son H. houses and land *without any words of limitation*. Also he willed that H. should enjoy certain other premises to him and his heirs forever, and for want of heirs of his body, to F. forever: it was held that H. had only an estate for life in those premises in reference to which no words of limitation were added.

So, where (c) a testator gave unto his wife, her heirs and assigns forever, all his lands in the parish of B., and then in the occupation of S. And he gave and devised to his loving wife **aforesaid* all his lands, tenements and houses lying in C., (to wit,) the house he then lived in, &c. (describing them); it was held that the wife took only an estate for life in the lands in C.

Words of limitation not extended by inference to other devises.

So, where, (d) as touching his "worldly and personal estate," a testator gave the same in the following manner: He gave to his grandson James Wright, *all his lands, freehold, copyhold and leasehold, in Essex*; also, he gave to his grandson James Wright, all his *estate*, freehold and copyhold, in Ellington, in Huntingdonshire; and also, he gave to his grandson John Wright, all his *estate*, &c., called the Coal-yard, in the parish of St. Giles, London; and he gave to his grandson James Camper, (who was his heir-at-law,) the house he lived in, and also his houses and land called Castle Yard, in Holborn, London: it was held

(b) *Spirt v. Bence*, Cro. Car. 368; [see *Hay v. Earl of Coventry*, 3 T. R. 83.]

(c) *Right d. Mitchell v. Sidebotham*, Dougl. 759. See also *Paice v. Archbp. of Canterbury*, 14 Ves. 366; [*Doe d. Crutchfield v. Pearce*, 1 Pri. 353.]

(d) *Doe d. Child v. Wright*, 8 T. R. 64; see also 1 B. & P. N. R. 335; where the same construction was adopted by three of the judges, with the reluctant concurrence of Sir James Mansfield.

that James Wright took only an estate for life in the lands in Essex, in respect of which the testator had not used the word "estate," which in two of the other devises was held to carry a fee.

A striking instance of the application of the principle in question appears in *Right d. Compton v. Compton*, (e) where a testator devised to his son Thomas Compton, (his heir-at-law,) all his lands for life, and he gave to his grandson Thomas Compton, after the death of his father, all the north side of his Down Farm, being about 250 acres; he gave to his granddaughter Frances, all the south part, being about 240 acres; he gave unto his grandsons George and Edmond, and his granddaughter Elizabeth, the upper part of the Lain Farm, being about 200 acres, equally between them as long as they should remain single; but if either of them should marry, "*then to have paid by the other two £10 a year for his or their life.*" He gave to Edward and John, and his granddaughters Mary and Ann, all that lower part of the Lain Farm, being about 240 acres, equally between them as long as they should live single; but if either of them married, *then £10 a year for his or their life*, (but not said to be paid by the others). The testator also gave unto his son's wife £5 a year out of each of the said farms, if she should survive him. It was contended that the words "to have paid *by the other two*," used in the clause respecting the upper part of the Lain Farm, (and which had the effect of enlarging the estate of the devisees of that farm to a fee,) (f) might be supplied in the *devise of the lower farm, in which they were omitted; as there could be no plausible reason assigned for supposing that the testator meant to make a different disposition of one part of the same farm to certain of his grandchildren, from that which he had made of another part of the same farm to other of his grandchildren. But the court decided that the devisees of the lower Lain Farm took an estate for life only. Lord Ellenborough said, "that the exposition of every will must be founded on the whole instrument and made *ex antecedentibus et consequentibus*, is one of the most prominent canons of testamentary construction; yet where between the parts there is no connection by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied the phrase

Words not supplied in order to render uniform several devises of different parts of one farm, to persons in same relationship.

(e) 9 East 267. [See also *Morris v. Lloyd*, 3 H. & C. 141.] (f) *Vide post* ch. XXXIII., § 2.

or expressed himself imperfectly, the court cannot go into one part of the will to determine the meaning of another *perfect in itself and without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction." And he subsequently said, that "from a testator having given persons in a certain degree of relationship to him a *fee-simple* in (part of) a certain farm, no conclusion, which can be relied upon, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm, where the words of the two devises are different: the more natural conclusion is, that, as his expressions are varied, they were altered because his intention in both cases was not the same."

Again, in *Doe d. Ellam v. Westley*, (*h*) where a testatrix gave several pecuniary legacies, prefacing each bequest with the word *Item*. "*Item*" she devised a messuage to J. E., and after his decease to his son. She then proceeded as follows: "*Item*, I give and bequeath unto M. W. all that my messuage or dwelling-house wherein I now dwell, with the garden, and all the appurtenances thereunto belonging; and I also give unto the said M. W. all my household goods and chattels, and implements of household within doors and without, *all for her own disposing, free *will, and pleasure*, immediately after my decease;" it was held, that the words in italics were confined to the last section of the clause, and consequently that the devisee took only an estate for life in the messuage. [And in *De Windt v. De Windt*, (*i*) where a testator devised his estates in N. to his nephew A for life, and after his death to his sons in tail lawfully begotten; and in the event of his or their death without sons lawfully begotten, the testator left the said estates to his cousin B, and after his death to his sons lawfully begotten, *beginning with the elder*. It was held that these four words applied to the latter limitation only, and not to the limitation to the sons of A, who consequently took as tenants in common.

Again, in *Walker v. Tipping* (*k*) where, amongst several legacies of

Words enlarging or modifying estate of devisee not extended to other devises in the will;

(*h*) 4 B. & C. R. 667; [see also *Anon.*, Moo. 52; *Gower v. Towers*, 26 Beav. 81. But it is said a devise thus, "I give Blackacre to C. and his heirs, *and also Whiteacre*" (not repeating the devisee's name and the verb of gift), gives C. the fee in Whiteacre; per *Levinz, J.*, 1 Mod. 130.
(*i*) L. R., 1 H. L. 87.
(*k*) 9 Hare 800. But it is difficult to overcome the impression that the bequests in question were elliptical. See *Willis*

—nor words diminishing it. £300 each to the testator's grand-nephews, some of which were directed to be paid at particular ages, and others to be sunk in annuities for the lives of the respective legatees, there occurred two bequests as follows: "J. W., £300 annuity for life." "Martha—, £300, an annuity for life." Sir G. Turner, V. C., held, that he could not read these bequests as if they were gifts of sums of £300 *to be sunk* in annuities for the lives of the legatees, but must understand them in their plain and obvious sense as giving annuities of £300.

The same principle is applicable to the *objects* of a devise. Thus, in *Clarke v. Clemmens*, (l) where a testator bequeathed legacies to "my brother A," "my sister B," "the widow of my late brother C," and "the eight children of D," and gave the residue of his estate to X for life, and after her death, "in trust for *the said* A, B, and C, and the eight children of the said D," it was held by Sir R. Malins, V. C., that the testator never intended to give a share of the residue to C, for he had already referred to him as dead at the date of the will; it was clear, therefore, that he had made some mistake, and it was highly probably that he intended to have given the share to C's widow, but as this intention was not certain, the court could not make the addition needed to effectuate it. (m)

*Still less can the words of a devise contained in a will be extended to modify the effect of an independent devise contained in a codicil.] (n)

But where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems, they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxta-position.

v. Curtois, 1 Beav. 189, where a testator gave to A his "carriages, horses, &c., and chattels in and about his house at M.; and also his household goods and furniture, pictures, plate, &c., and likewise his watches and personal ornaments;" Lord Langdale, M. R., held that A was entitled to all the testator's household goods, &c., and not those only which were at his house at M. As to the force of the word "item," or "also," see *Hopewell v. Acland*, 1 Salk. 239: of the word "likewise," *Paylor v. Pegg*, 24 Beav. 105.

(l) 36 L. J., Ch. 171.

(m) Note, however, that the words "the said" confined the choice to those previously mentioned, that C was confessedly out of the question, that all the others were correctly re-named except C's widow and X (on whose death the disposition was to take effect), and that between these two there could scarcely exist a judicial doubt.

(n) *Biss v. Smith*, 2 H. & N. 105; *Grimson v. Downing*, 4 Drew. 132.]

As, in *Fenny d. Collings v. Ewestace*, (o) where a testator devised, "first," to his wife, all his household goods, &c., to her and her heirs forever; *also*, he gave to his wife three cow commons, to her and her heirs forever. "2ndly," To his two nephews, J. and T. C., all that piece of land called P.; *also*, he gave to his nephews, J. and T. C., all that piece of land called L., to be equally divided between them as tenants in common, *and to their several heirs and assigns forever*. "3dly," as follows: "I give unto my nephew J. D. all that my house and premises at P., in the occupation of R.; I *also* give unto my nephew J. D. all that my land in the parishes of P. and A., in the occupation of J. T. to him my said nephew J. D., his heirs and assigns forever." The question was, whether the words of limitation in the last devise applied to the lands in the occupation of R., or were confined to those immediately preceding, *i. e.* in the occupation of J. T.; and it was held that they applied to both. Lord Ellenborough said, "If it had not been for the numerical arrangement, there might have been some difficulty, but that removes it. It seems clear, from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

II. *As to the transposition of words and clauses.*—It is quite clear that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context Words may be transposed, when. by being (p) transposed, the courts are warranted in making that transposition.⁵

(o) 4 M. & Sel. 58; [see also *Child v. Augustus v. Seabolt*, 3 Metc. (Ky.) 156; *Elsworth*, 2 D., M. & G. 679; *Gordon v. Creveling v. Jones*, 1 Zab. 573; *Ex parte Gordon*, L. R., 5 H. L. 282 (where several clauses began, each with the words "as to,")]

(p) See *Green v. Hayman*, 2 Ch. Cas. 10; *Sparke v. Purnell*, Hob. 75; *Cole v. Rawlinson*, 1 Salk. 236; *East v. Cook*, 2 Ves. 32; *Duke of Marlborough v. Lord Godolphin*, Id. 74; [*Gibson v. Lord Montford*, 1 Id. 490; *Mohun v. Mohun*, 1 Sw. 201.]

5. As to transposition of words, where necessary, see *Hunt v. Johnson*, 10 B. Mon. 344; *Linstead v. Green*, 2 Md. 82; *Augustus v. Seabolt*, 3 Metc. (Ky.) 156; *Creveling v. Jones*, 1 Zab. 573; *Ex parte Hornby*, 2 Bradf. 420, where "James, son of Frederick," was transposed to "Frederick, son of James;" *Pond v. Bergh*, 10 Paige 140; *Penna. Co. Ins. v. Stokes*, 1 Brewst. 486; *Linstead v. Green*, 2 Md. 82; *O'Neill v. Boozer*, 4 Rich. Eq. 22; *Baker v. Pender*, 5 Jones L. 351. But transposition is to be made only when it is necessary to give effect to a meaning and purpose of the testator which is *certain*, *Latham v. Latham*, 30 Iowa 294. Words may likewise be rejected when necessary, *Hall v. Hall*, 123 Mass.

*Thus, where (q) A devised all that his messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, in the parish of *M. R.*, then in the occupation of *T. W.*, except one meadow, called Floodgate Meadow; and it appeared that *T. W.* was in possession of the messuage, and a small part only of the lands in Blythbury, and not of Floodgate Meadow; it was held, that the words "now in the occupation of *T. W.*" might be transposed and applied to the dwelling-house according to the fact, which would render the whole consistent; whereas, without this transposition, the exception of Floodgate Meadow was senseless and nugatory, as it had never been in the occupation of *T. W.* The effect consequently was, that the devise extended to all the lands in Blythbury, except Floodgate Meadow, whether in the occupation of *T. W.* or not.

So, where (r) the devise was in the following words: "I devise all my hereditaments in Standon unto my sister Elizabeth Thorley and to her daughters Ann Shaw and Frances Thorley, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint tenants, *for and during the life of my said sister Elizabeth Thorley*; and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments *so devised to my said sister for life as aforesaid*, unto her said two daughters Ann Shaw and Frances Thorley, their heirs and assigns forever, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." It was contended, that under this devise the daughters of the testator's sister took estates *pur autre vie* for the life of their mother concurrently with her as tenants in common; and *as to one-third* with remainder in fee to the daughters, leaving the reversion in fee in the other two-thirds undisposed of; but it was held, that the daughters took estates in fee in the *entirety* expectant on the decease of their mother. Lord Ellenborough said, "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way, as, if *taken in the*

120; *Mason v. Jones*, 2 Barb. 229; *Estate of Wood*, 36 Cal. 75; *Jameson*, App't, 1 Mich. 99; *Wooton v. Redd*, 12 Gratt. 196; *Bartlet v. King*, 12 Mass. 536, 542. As to interchange of the words

"heirs," "issue," "children," see chapter XXVIII., *et seq.*

(q) *Marshall v. Hopkins*, 15 East 309.

(r) *Doe d. Wolfe v. Allcock*, 1 B. & Ald. 137.

order in which they stand, they do not convey any meaning; yet, in favor of common sense, we may take the liberty of transposing them, according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labor of the argument has been, to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole."

That this construction accorded with the intention of the testator, is highly probable; and if, as suggested, the words taken in the order in which they stood did not convey any meaning, Observations upon Doe v. Allecock. the established rules of construction clearly authorized the transposition. But the difficulty was in saying that the words *were* unmeaning in their actual order; for it is submitted, that the will, read in that order, contained a clear and express devise to the three devisees for the life of the mother, remainder as to one-third to the two daughters in fee; and had the testator deliberately intended to confine his dispositions to those estates, he could hardly have expressed himself in more technical or formal language. The construction indeed was apparently absurd, but let it be remembered that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation. (s) However, the case was *professedly* decided upon the principle before laid down, and may, therefore, properly be treated as an authority in favor of that principle. (t)

Another case of transposition sometimes occurs, where a testator has devised lands at A to B, and lands at C to D, and it appears by the fact of the limitations of each devise being Transposition of the subject of devise. exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each instance, placed the devised estate in the position intended to have been occupied by the other.

As where (u) J. H.,—having an estate in the county of Monmouth, of which he was seized in fee to his own use, and another estate in the

(s) *Mason v. Robinson*, 2 S. & St. 295.

[(t) But *Holroyd, J.*, while concurring in the decision, rested his judgment on the ground that the words "equally to be divided" down to "*Elizabeth Thorley*," might be read as in a parenthesis, and so made to refer only to the mode of enjoy-

ment during the life of *E. Thorley*, without affecting the quantity of estate to be taken by the devisees.]

(u) *Moseley v. Massey*, 8 East 149; [conf. *Doe d. Chevalier v. Uthwaite*, 8 Taunt. 306, 3 B. & Ald. 632.]

county of Radnor, of which he was also seized in fee subject to the trusts of his marriage settlement, (by which he had covenanted to convey the lands to the use of himself, remainder to his wife for life, remainder to his first and other sons in tail,) both which estates had formerly belonged to an uncle, *and came to him, the one by descent, the other by purchase from another co-heir of his uncle,—by his will, reciting that he was seized in fee of a messuage and lands at L., in the county of Radnor, and of a moiety of a messuage in the parish of O. R., in the county of Radnor, and that he was also seized of the reversion in fee, expectant on the death of his wife, and of his son without issue, of lands in the counties of Monmouth and Northumberland, (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own,) devised his said estate in the said county of Radnor to his wife for life, remainder to his only son for life, remainder to his (the son's) sons and daughters in tail, in strict settlement, remainder to his own daughter, &c., and devised the reversion of his said estates in the said county of Monmouth, *after the deaths of his wife and only son without issue*, to his daughter, &c. The will moreover referred to the lands devised as part of the estate of his late uncle. It was held that, comparing the devising clause with the recital and the facts, sufficient appeared to ascertain, beyond a possibility of doubt, that the deviser had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had misdescribed their respective local situations.

[It seems therefore that, although the words as they stand are not absolutely senseless or contradictory, transposition will be made if it be required to effectuate an intention clearly expressed or indicated by the context. *Eden v. Wilson* (*x*) is an instructive example of this doctrine. A testator devised his estates to his daughter for life, remainder to her first son R. for life, remainder to his first and other sons successively in tail, remainder to her second son J. for life, with like remainder to his sons in tail, with remainders to the daughter's third, fourth and other sons in tail; and with a proviso shifting the estate from any son who might become entitled to the D. estates under the will of the late D. (by which those estates were entailed on the second and younger sons); "provided al-

Transposition
of words to fit
the general
intent.

ways that if my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited, then and in either of those cases, I devise the said real estates to all the daughters of *the body of my said daughter living at her death as tenants in common and their heirs respectively, with cross remainders amongst them in case of any one or more of them happening to die under twenty-one and without issue, and if there should be but one such daughter living at my said daughter's decease and no issue of any other daughter then in being, then to such only surviving daughter and her heirs, but if any such daughter shall die in her said mother's lifetime leaving issue "such issue to take their parents' share, "and in case my said daughter shall have no issue of her body living at her death" then over. At the death of the testator's daughter her two sons R. and J. were living, besides several daughters; but both sons afterwards died without issue, and it was contended that the second of the two cases "in either of" which the limitation to the daughters was to take effect had thus happened: but it was held in D. P. upon the whole proviso that the estates limited by it were not designed as a mere continuation of the previous limitations (to which they did not fit on), but were intended to take effect, if at all, at the daughter's death in favor of persons then living, and that to effect this the words "living at her death" in the introductory passage must be read in connection with the verb "have," not with the words "issue male of her body," and so made to run through both branches of the proviso. In other words, the expression "living at her death" was transposed and read as if it came immediately after the verb "have." It was not, however, a limitation cutting down the previous devise, but a remainder contingent on the determination of that devise in a particular manner.]

The same principle, too, is applicable to the *objects* of a devise; for it has been held, that, where (y) a testatrix, having two <sup>Transposition
of name.</sup> nieces, Mary who had never been married, and Ann who had been married and was dead leaving two children, bequeathed one moiety in a certain portion of her property to *the children* of her niece *Mary*, and the other moiety to her niece *Ann*; it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the court corrected the mistake.

III. *As to changing words.*—To alter the language of a testator is

As to changing words. evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context. It often *happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one; (z) and, if this be clear, the alteration of language is warranted by the established principles of construction.⁶ *Doe v. Gallini* (a) affords an apposite example of such a correction of phrase. The testator, after devising estates for life to his children, and, in case of the death of any of them, to their respective children living at their decease, for life, proceeded thus: "And from and after the decease of all the children of *each* of my said sons and daughters *without* issue, I give and devise the estate or estates to them respectively limited as aforesaid, unto and among all and every the *lawful issue* of such child or children during their lives as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining." It was contended that the word "all" was to be changed into "any," and the words "without issue" to be read "leaving issue," in order to render the language of the will sensible and consistent with the context; and the court did not hesitate in adopting this construction, though the point was not the main subject of discussion in the case.⁷

Words "without issue" read leaving issue.

[So, in *Hart v. Tulk*, (b) where a testator's general intention appeared by the will to be to make an equal distribution of his property, (which he described in seven different schedules),

"Fourth" read "fifth."

[(z) *Taylor v. Richardson*, 2 Drew. 16.]
 6. The word "*majority*" was changed to "*minority*," *State v. Joyce*, 48 Ind. 310; the word "*bequeath*," to "*devise*," *Dow v. Dow*, 36 Me. 211; the word "*oldest*" to "*youngest*," *Taylor v. Johnson*, 63 N. C. 383. And in *Den v. Combs*, 3 Harr. (N. J.) 27, "*to bequeath to*," was changed to "*to go to*;" *Den v. McMurtrie*, 3 Gr. (N. J.) 276, "*to return to*," was changed to "*to remain to*;" "*may leave*," to "*may have*," *DuBois v. Ray*, 35 N. Y. 162;

"*reviving*," to "*surviving*," *Pond v. Bergh*, 10 Paige 140; "*part*," to "*share*," *Tulford v. Hancock*, 1 Busb. Eq. 55; "*her*," to "*their*," *Horwitz v. Norris*, 60 Penna. St. 261.

(a) 5 B. & Ad. 621, 3 Ad. & Ell. 340, 2 Nev. & M. 619, 4 Nev. & M. 893. [And see *Jarman v. Vye*, L. R., 2 Eq. 784 ("all" admitted to mean "any.")]

7. But see *Lynch v. Hill*, 6 Munf. 114. (b) 2 D., M. & G. 300; and see *Philpotts v. Chamberlaine*, 4 Ves. 50; *Dent*

amongst his seven children ; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner, that, if in a particular clause, the words "fourth schedule" were read literally, not only would the entire plan of the will, as indicated above, be frustrated, but the payment of the debts in the manner provided by the will would become impossible ; Sir J. K. Bruce and Lord Cranworth, L. JJ., held that they were warranted in reading the word "fourth" as meaning "fifth," *which the context showed was the change required to render the will consistent.]

The changing of words, however, has most frequently occurred in regard to expressions, which, in common parlance, are often used inaccurately ; as the word "severally" for "respectively," of which we have an instance in *Woodstock v. Shillito*, (c) ^{"Several" used in sense of respectively.} where a testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives ; and from and after the *several* deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. The surviving daughters claimed to be entitled to the entire fund, under the express gift to the daughters living at the decease of the testator's widow ; but Sir L. Shadwell, V. C., held, that the words "from and after the several deceases of my said daughters," were to be construed "from and after the decease of my daughters *respectively*." "It was clear," he said, "the testator meant to give to the children the share of their mother on her death."

But by far the most numerous class of cases, exhibiting the *change* of a testator's words, are those in which the disjunctive "Or," changed ^{into *and*.} "or" has been changed into the copulative "*and*," and *vice versa*.⁸ It is obvious that these words are often used orally with-

v. Pepys, 6 Mad. 350 ; *Bengough v. Edridge*, 1 Sim. 173 ; *Pasmore v. Huggins*, 21 Beav. 103, (where "future" might, it seems, have been read "former") ; In re Bayliss' Trust, 17 Sim. 178, (where "are" was interpreted in a future sense) ; *Taylor v. Creagh*, 8 Ir. Ch. Rep. 281, (£400 read £500) ; compare *Thompson v. Whitelock*, 5 Jur. (N. S.) 991.]

(c) 6 Sim. 416.

8. In some cases "*and*" has been changed into "or," as follows : *Engle-*

field v. Woolfart, 1 Yeates 41, where the legacy was to such as prove themselves grandchildren, *and* makes such proof within six years ; *Janney v. Sprigg*, 7 Gill 197, where the expression was "unmarried *and* without leaving children ;" *Sayward v. Sayward*, 7 Greenl. 210, where the devise was to S., "on condition he lives to the age of 21 years *and* has issue ;" or, *vice versa* : to those that may be alive at A's death, *or* the heirs of any that may be dead, *Scott v. Guernsey*, 60 Barb. 163 ;

out a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the courts have often been called upon to rectify blunders of this nature: so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognized by the judges who decided them.

It has been long settled that a devise of real estate to A and his heirs, or, which would be the same in effect, to A indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word "*or*" is construed "*and*," and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.⁹

In the case of devise over, in event of death under twenty-one, *or* without issue.

a limitation over, "if he should have no child *or* his wife not be with child *or* in case he should at his death have a child and such child die before 21," *Turner v. Whitted*, 2 Hawks 613; if A marry *or* become unable to maintain his children, *Boyd's Estate*, 9 Phila. 337; if A die before the age of twenty-one years *or* without having married, *Janney v. Sprigg*, 7 Gill 197; before age *or* without any bodily issue, *Shands v. Rogers*, 7 Rich. Eq. 422. And in general see *Jackson v. Reeves*, 1 Wend. 388; *Jackson v. Topping*, 1 Wend. 388; *Harrison v. Bowe*, 3 Jones Eq. 478; *Brewer v. Opie*, 1 Call 184. While a change from "*and*" *or* "*or*" to the other was refused in *Ely v. Ely*, 5 C. E. Gr. (N. J.) 43, where there was power given life tenant to expend principal "in case she should lose any of her property *and* need more;" so until she "marry *or* deem it advantageous to sell," *Courter v. Staggs*, 12 C. E. Gr. (N. J.) 305; when twenty-one *and* unmarried, *Roome v. Phillips*, 24 N. Y. 463; "shall die during their minority *and* without any heir *or* heirs," *Butterfield v. Haskins*, 33 Me. 392, 393.

9. "*Or*" is generally construed to mean "*and*" in limitations over, if the first taker die under age *or* without issue. *Tennell v. Ford*, 30 Ga. 707; *Parrish v. Vaughan*, 12 Bush 97; *Neal v. Cosden*, 34 Md. 421; *Raborg v. Hammond*, 2 Harr. & Gill 42; *Ray v. Enslin*, 2 Mass. 554; *Hunt v. Hunt*, 11 Metc. 88; *Parker v. Parker*, 5 Metc. 137; *Den v. English*, 2 Harr. (N. J.) 280; *Den v. Mugway*, 3 Gr. (N. J.) 330; *Den v. Taylor*, 2 South. 413; *Nevison v. Taylor*, 3 Halst. 43; *Grim v. Dyar*, 3 Duer 354; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Jackson v. Blanshan*, 6 Johns. 54; *Van Vechten v. Pearson*, 5 Paige 512; *Ward v. Barrows*, 2 Ohio St. 242; *Hauer v. Shitz*, 2 Binn. 532, reversing 3 Yeates 205; *Kelso v. Dickey*, 7 Watts & S. 279; *Beltzhoover v. Costen*, 7 Penna. St. 13; *Holmes v. Holmes*, 5 Binn. 252; but see, *contra*, *Robertson v. Johnston*, 24 Ga. 102; *Holcomb v. Lake*, 4 Zab. 686, affirmed 1 Dutch. 605. And a construction *vice versa* has been refused in such limitation, *Carpenter v. Heard*, 14 Pick. 449; *Cheese-man v. Watson*, 8 How. 263; *Chrystie v.*

*One of the earliest authorities for this construction is *Soulle v. Gerrard*; (*d*) where a testator, having four sons, devised lands to Richard, one of his sons, and his heirs, forever; and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the land should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held, that in the event which had happened, the devise over to the three sons had failed; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was "all one as if the disjunctive *or* had been a copulative."

The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends Principle of the rule; that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one, (the age at which he would acquire a disposing competency,) he should take the estate absolutely, *i. e.*, whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition.

And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable. —applicable to bequests of personalty. (as the reason of it evidently is) to bequests of personalty; and, therefore, in the case of a legacy to A, and in case of his death under age *or* without issue, to B, it is not to be doubted that A would retain the legacy, unless he died under age *and* without leaving issue at his decease.

And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority. As in *Mytton v. Boodle*, (*e*) where a testator bequeathed £5000 to A if he

Phyfe, 19 N. Y. 344; *Griffith v. Woodward*, 1 Yeates 316; *Cheeseman v. Wilt*, Id. 411; *Carpenter v. Boulden*, 48 Md. 122.

(*d*) *Cro. El.* 525; *S. C., nom. Sowell v. Garrett*, Moore 422, pl. 590; *Price v. Hunt*, Pollex. 645; *Barker v. Suretees*, 2 Str. 1175; *Walsh v. Peterson*, 3 Atk. 193;

Doe d. Burnsall v. Davy, 6 T. R. 34; *Fairfield v. Morgan*, 2 B. & P. N. R. 38; *Eastman v. Baker*, 1 Taunt. 174; *Right v. Day*, 16 East 67; see also *Doe d. Herbert v. Selby*, 4 D. & Ry. 608, 2 B. & Cr. 926; [*Morrall v. Sutton*, 1 Phill. 551.]

(*e*) 6 Sim. 457.

attained twenty-one; but if he should not attain that age, *or* died without leaving issue, then over. It was held, that A, on attaining twenty-one, was absolutely entitled.

*In this case (*f*) the expression which raised the question in the will was repeated in the codicil—a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a devise in fee or bequest to A, with a gift over in case of his dying during minority *unmarried*, or without issue; (*g*) and that, too, though the copulative “and” is found in company with the disjunctive “or” in the same will, indeed, in this very sentence. As in *Miles v. Dyer*, (*h*) where the bequest was to A for life, and after her decease to her children on their attaining twenty-one; and in case they should die in the lifetime of A, *or* under twenty-one, *and* without leaving issue, then over, it was held that the interests of the children were not divested unless the three events happened.

It is obvious that the ground for changing *or* into *and* exists *a fortiori* where children or issue are the express objects of the prior gift; as where (*i*) there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently,) in tail, with a devise over if he die *under twenty-one OR without children*.

It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or, at least, who *might* take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether

[(*f*) And in *Framlingham v. Brand*, *inf.*]

(*g*) *Framlingham v. Brand*, 3 Atk. 390; [see *Doe v. Cooke*, 7 East 269, *post.*]

(*h*) 5 Sim. 435, 8 Sim. 330.

(*i*) *Hasker v. Sutton*, 9 J. B. Moo. 2, 1 Bing. 501. [But the only question there was whether the remainder was vested or

not. The defendants could not succeed unless it was, and it could be so only by adopting Lord Hardwicke's “construction” in *Brownsword v. Edwards* (*post* *509): reading *or* as *and* was insufficient: and the court certified against them. And see now *Cooke v. Mirehouse*, 34 Beav. 27, *post* *512.]

the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to A, and if he shall die *in the lifetime of B* OR *without *issue*, (k) [or die *without issue* OR *intestate*,] (l) then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife.

Thus, where (m) a testator bequeathed the residue of his personal estate to his daughter, her executors, &c., with a proviso, Gift over on death under twenty-one, or without leaving a husband. that in case his daughter happened to die under twenty-one, *or without leaving any husband* living at her death, then he gave several legacies, all which he directed to be paid within twelve calendar months after his decease, *in case of the death of his daughter under age as aforesaid*; and in such case he gave the residue to other persons—Sir W. Grant, M. R., held, that “or” was to be read “and,” and that the expression “under age *as aforesaid*” meant not leaving a husband.

The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not to be rejected or changed on account of their unreasonableness; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails; though it is by no means equally clear that the rule is *confined* to such cases.

Lord Hardwicke, in *Brownsword v. Edwards*, (n) expressed an opinion, that the construction in question was not applicable to estates tail, [on the ground that there was no oc- Whether rule applies to estates tail.

(k) *Wright v. Kemp*, 3 T. R. 470, [a case on a transaction *inter vivos*; *Denn v. Kemeyes*, 9 East 366; *Doe d. Knight v. Chaffey*, 16 M. & Wels. 656. see *Incorporated Society v. Richards*, 1 D. & War. 283; *Greated v. Greated*, 26 Beav. 621.]

(m) *Weddell v. Mundy*, 6 Ves. 341.

(l) *Green v. Harvey*, 1 Hare 428; *Beachcroft v. Broome*, 4 T. R. 441; and (n) 2 Ves. 249.

casion for it; since an estate tail was capable of a remainder, and the words might, by an "easy construction," be read as such; *so as to secure the estate to the issue, if any, and yet give effect to the remainder in case the issue failed at any time.* At the present day the *court follows Lord Hardwicke in declining to change "or" into "and" (or the contrary) where the prior estate is in tail, but rejects the "construction" upon which alone his opinion was based. The course of decision deserves attention. In some of the cases, it will be seen, the gift over was if the tenant in tail should die under twenty-one *or* without issue, in others the conjunction "and" was used.]

In *Brownsword v. Edwards*, (o) the devise was to trustees and their heirs to receive the rents until A should attain twenty-one; and if he should live to attain twenty-one or have issue then to A and the heirs of his body; but if A should die before twenty-one *and* without issue, then in trust for B [in like manner, with gifts over in the like words to other branches of testator's family; and for want of such issue to his own right heirs.] A and B were the testator's illegitimate son and daughter, [but for the purposes of the argument were taken to be legitimate.] A attained twenty-one and died without issue, [and it was argued that the gift to B had failed, only one of the two events upon which it was limited having happened. But Lord Hardwicke held B to be entitled. He said, "There is no necessity in this case to transpose or supply material words; but there is a plain, natural construction upon these words, viz., if A shall happen to die before twenty-one, and also shall happen to die without issue; which construction plainly makes the dying without issue *to go through the whole* and fully answers the intent, which was in that manner. Had the first devise been to A and his heirs this construction I believe could not be made; for where there is such a contingent limitation I do not know that the court has changed heirs into heirs of the body to make it so throughout. But much stronger constructions than this have been made in devises: as, in a devise to one and his heirs, and if he should die before twenty-one *or* without issue, the court has said it was not the intent to disinherit the issue, and therefore *or* shall be construed *and*; but if the first limitation had been in tail there would be no occasion to resort to that, but the court would make the construction I do now" (showing that, whether the word of the will was *and* or *or*, he thought some "con-

(o) 2 Ves. 249.

struction" equally necessary,) "viz., if he dies without issue before twenty-one then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder: an estate tail is capable of a remainder, and it is *natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the right heirs to defeat all the intermediate limitations to his family."

A stricter adherence to the letter was preserved in the earlier case of] *Woodward v. Glasbrook*, (o) where a testator devised a house to his sons, James and Thomas, and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided, that if any of his said children should die under twenty-one or unmarried, (p) the part or share of him or her so dying should go to the survivors; and it was held by Holt, C. J., that the shares of two of the children dying unmarried, though they attained twenty-one, went to the devisees over.

Woodward v. Glasbrook.

Devise over if devisee in tail should die under twenty-one or unmarried.

In *Doe d. Usher v. Jessep*, (q) where A devised to trustees and their heirs, in trust for his natural son J. and the heirs of his body, and if J. should die before he attained his age of twenty-one years, and without issue, then over. J. attained his majority, but died without issue. It was contended, on [a mistaken view] of *Brownsword v. Edwards*, that "and" was to be read or, which would, in the event that had happened, give effect to the devise over; but Lord Ellenborough, though he admitted the cases to be very similar, (the only distinction being that the limitation over in the cited case was in favor of a daughter, who, without such a construction as was there put upon the word "and," would have been without a provision) [which is a distinction without a difference], (r) decided that the word was to be taken in its literal sense.

Doe v. Jessep.

"And" not changed into "or," in limitation over after an estate tail.

[Again, in *Mortimer v. Hartley*, (s) where the testator devised lands to John and Ann successively in tail, (t) and "if it should

Mortimer v. Hartley.

(o) 2 Vern. 388.

(p) Not "without issue." But "unmarried" equally involves the extinction of the estate tail.

(q) 12 East 288; see also *Soulle v. Gerrard*, Cro. El. 525 (stated *ante* p. *506), where it was considered (though, according to subsequent authorities, errone-

ously), that the first devisee had an estate tail.

[(r) 6 H. L. Cas. 84, 85, 96.

(s) 6 Exch. 47, 3 De G. & S. 316.

(t) The Court of C. B. held upon the same will that the prior devise gave a fee, and then they read "or" as "and," 6 C. B. 819.

please God to take away both Ann and John under age, or without leaving lawful issue" then over to X. Ann died under age and without issue, and John died without issue, but not under age. On a case from chancery the Court of Exchequer refused to read "or" as "and," and held that the devise over took effect. Parke, B., in delivering the judgment of the court, said, "If we abide by the words of the will, it is possible we may dis*appoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under age, but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to X on the determination of the estate tail: on the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under age, we defeat the clear and manifest intention to give the remainder to X on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided." If the first devise had been in fee simple he admitted the authorities would have required the change; "but as none of the authorities apply to an estate tail and we have Lord Hardwicke's high authority for distinguishing such a case, we think we ought to do so, and abide by the ordinary sense of the words. *If any change should be made*, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been 'if it should please God' to take away both John and Ann under age *or at any time* without issue.' By so reading them the issue would take if their parents died under age and X succeed on the determination of the estate tail. But *if this cannot be done* we think we should make no change at all."

But this was exactly the change which the court had "Lord Hardwicke's high authority" to make. Whether it was made or not, the result, as it happened, was the same; for in either case the gift over took effect without disappointing any issue. But if there had been any issue they would have been disappointed, and it seems strange to invoke Lord Hardwicke's authority for a conclusion which it was the declared object of his construction to avoid. When the case came back to chancery, Sir K. Bruce, V. C., virtually adopted that construction, saying, "On the authority of *Brownsword v. Edwards and Murray v. Jones* (u) and other cases I am of opinion that the testator has

[(u) 2 Ves. & B. 313, stated *post* ch. L.]

but inaccurately expressed that he disposed of everything after the failure of the limitations in the prior clauses, *in whatever manner they might fail.*"

It is evident, however, that this construction strikes out the words "under twenty-one;" and in *Grey v. Pearson*, (v) where the will was undistinguishable from the will in *Doe v. Jessep*, *the devisee in tail attained twenty-one, but afterwards died without issue; and it was held in D. P., following *Doe v. Jessep*, that the words must be taken literally, and that the gift over failed. It was admitted that where lands were devised to one *and his heirs* with a gift over if he died under twenty-one *or* without issue, "or" was to be read "and;" it was too late to question the authorities which had so decided: but, it was said, those decisions did not govern a case where the first devise was in tail, with a gift over if the devisee died under age *and* without issue. The house refused therefore to apply those authorities to the case before it; and on the ground that Lord Hardwicke's "construction" had not been uniformly adopted it rejected that also, deeming it to be somewhat forced and very unusual. (x)

Modern authority, therefore, while it still distinguishes the case of an estate tail, deals with it on wholly different principles from those upon which the distinction was originally based. For (as we have seen) Lord Hardwicke never meant to read the words so as in any event to disappoint the issue; whereas *Mortimer v. Hartley* and *Grey v. Pearson* will require both "or" and "and" to be strictly construed although the issue may be thereby disappointed. The readiness with which Lords Cranworth and Wensleydale accepted the distinction of an estate tail, while rejecting the grounds for it, was plainly due to their disapprobation of the so-called speculative system of construction adopted in the old authorities; and since *Grey v. Pearson* "or" has been strictly construed even in the case (already mentioned as furnishing an *a fortiori* argument for changing "or" into "and") where children or issue were express objects of the prior gift: as, where (y) the devise was to A for life if he should attain thirty-one, with

(v) 6 H. L. Cas. 61, by Lords Cranworth and Wensleydale, *diss.* Lord St. Leonards.

(x) Lord St. Leonards, on the other hand, thought it "easy and natural." As to *Doe v. Jessep* he said it was hastily decided and that the judges of K. B.

showed by their remarks that they misunderstood the real nature of the case, 6 H. L. Cas. 97.

(y) *Cooke v. Mirehouse*, 34 Beav. 27. As to *Hasker v. Sutton*, 9 J. B. Moo. 2, 1 Bing. 501, *vide sup.* p. *507, n.

remainder to his eldest son in fee, with a gift over if A should die under thirty-one *or* not have a son. A attained thirty-one but died without having a son, and it was held that the gift over took effect, for that "*or*" could not be construed "*and*." Sir J. Romilly, M. R., said he never knew of a case where the change had been made for the purpose of defeating the will and creating an intestacy. It will, however, be perceived that if A had had a son and afterwards died under thirty-one the son would have been disappointed: for the construction could not properly depend on the *event. The literal construction, however, has not yet been tested by any case where such disappointment would have ensued.

Of changing "*and*" into "*or*" in cases where the previous estate is not in tail more will be said hereafter.] To return for the present to the cases in which "*or*" has been construed *and*. The argument for this construction is, of course, very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in *either* of two alternate events, unless both events should happen, as in the case of a bequest to A on his attaining thirty-one *or* marrying; and in case he should die under thirty-one *or* unmarried, then over: in such a case "*or*" is necessarily construed *and*, in order to make the limitation over consistent with the terms of the prior gift. (z) [So where property is given to a person in either of two events, and afterwards given over in terms unless not only those two events, but an additional event also happens, Sir L. Shadwell, V. C., thought that, if it were necessary, the court would read the word *or* as *and*. (a)]

These decisions depended on the inconsistency which, upon a literal construction, would have existed between the prior gifts and the executory gifts over. Where there is no prior gift this ground fails: so that a bequest to A after the death of testator's mother *or* the second marriage, death *or* forfeiture of his wife, although the testator had made life-provisions for both his mother and wife, upon whose death therefore a certain amount of the estate would be set free, was held to take effect immediately on the death of the

(z) *Grant v. Dyer*, 2 Dow 87; [Thompson v. Teulon, 22 L. J., Ch. 243; Collett v. Collett, 35 Beav. 312, stated ch. XXVII., § 1. and Miles v. Dyer, ante p. *507; Law v. Thorp, 25 L. J., Ch. 75, 1 Jur. (N. S.) 1082; Johnson v. Simcock, 6 H. & N. 6, 7 Id. 344; Bentley v. Meech, 25 Beav. 197; Hawkins v. Hawkins, 7 Sim. 173.]

(a) *Grimshawe v. Pickup*, 9 Sim. 591;

mother without waiting for the second marriage, death or forfeiture of the wife: in other words, the court refused to read "or" as "and." (b) And a similar observation must be made with reference to the opposite change of "and" into "or." (c)

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head. Thus, in *Long v. Dennis*, (d) where there was a devise to A for life, upon condition that if he should marry with any woman not having a competent fortune, *or* without the *consent of trustees, the estate should not vest; the Court of K. B., considering that the testator meant to require the sanction of the trustees only in case A married a woman without a competent fortune, and also that conditions in restraint of marriage were odious, held that the estate vested upon performance of either part of the condition; that is to say, they read the word "or" as *and*. And in another case, where a testator bequeathed (e) the produce of real estate, after the cesser of certain life-estates, to J. A. for life, and after his death to his eldest son for life, "and to remain entailed on the eldest son descended from J. A. and his posterity from one generation to another forever: but in case of death *or* want of issue from the said J. A.," then over: Sir L. Shadwell, V. C., read the will as if it had been "in case of death *and* failure of issue," so as to agree with the general intent collected from the context, that all the descendants of J. A. were to take in succession.]

Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive "or" occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty; (f) but more frequently, in such cases, the word has been changed into *and*. As in *Richardson v. Spraag*, (g) where a testatrix bequeathed money in trust for such of her daughters or daughters' children as should be living at her son's death—it was held, that the children, as well of the living as of the deceased daughters, came in for their shares, the word "or" being read *and*.¹⁰

(b) *Hawksworth v. Hawksworth*, 27 Beav. 1.

(c) See *Malden v. Maine*, 2 Jur. (N. S.) 206.

(d) 4 Burr. 2052; see also *Nicholls v. Tolley*, 2 Vern. 388.

(e) *Monkhouse v. Monkhouse*, 3 Sim. 119; see also *Hawkes v. Baldwin*, 9 Sim. 355.]

(f) *Ante* p. *372.

(g) 1 P. W. 434.

10. Where a gift is to A and B *or* their

So, in *Eccard v. Brooke*, (*h*) where the bequest was to L. for his life, and after his decease to the nephews and nieces who should be then living, as well on the side of the testatrix's late husband as of her own, to wit, A or her children, and B or his children, and C or his children, and D or his children, and E or her children, share and share alike. Of these five persons four died in the lifetime of L., three without issue and one leaving two children. The other was living and had no child. Sir L. Kenyon, M. R., was of opinion that the word "or" must be considered as if it had been *and*, for that otherwise he must either adopt the argument that it meant to substitute the children of each nephew and niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground, or he must say that the clause was so uncertain *that he could give it to none. He held that the two children of the deceased niece and the surviving niece took in equal thirds; but that, if the latter had any children living, they would have taken equally with her.

Again, in *Horridge v. Ferguson*, (*i*) where the testatrix directed the residue of her property to be divided among such of the children of five persons (naming them) as should be born in lawful wedlock and living at her decease, *or* the issue of such of them as should be married—Sir T. Plumer, M. R., considered, that, in order to make sense of the passage, "or" might be construed *and*. All the children and grandchildren, therefore, took equally.

[And in *Maude v. Maude*, (*k*) where a testator bequeathed a sum of money to his four sons, A, B, C and D, in trust for another son E during his life, and after the death of E without children upon trust to divide the money equally amongst the testator's said sons A, B, C and D, *or* to such other of his sons as should afterwards be, in succession, trustees for E under the proviso therein—after contained, Sir J. Romilly, M. R., held that "or" must be read "and;" otherwise, if two of the four had died and two others had

heirs, it will be construed literally if a substitution is intended of their heirs in case of their death, but if the word is intended merely as a word of limitation it will be changed to "*and*." As to the former construction, see *Taylor v. Conner*, 7 Ind. 115; *Robb v. Belt*, 12 B. Mon. 643; *Sawyer v. Baldwin*, 20 Pick. 384; *Sayward v. Sayward*, 7 Me. 210; *Phyfe*

v. Phyfe, 3 Bradf. 45; *O'Brien v. Heeney*, 2 Edw. 242; *Hawn v. Banks*, 4 Edw. 664. As to the latter construction, see *Armstrong v. Moran*, 1 Bradf. 314; *Sloan v. Hanse*, 2 Rawle 28.

(*h*) 2 Cox 213.

(*i*) Jac. 583.

[(*k*) 22 Beav. 290.]

under the proviso become trustees in their place, and then E had died without issue, would the two original *or* the two new trustees take the fund? If they did not all take one class must be excluded.]

“Or,” too, has often been changed into *and* where interposed between the name of the devisee and words of limitation introduced into the devise, as in the case of a devise of real estate to ^{To A or his heirs.} A *or* his heirs, or to A *or* the heirs of his body, ^(l) [or to A *or* his issue, where the word “issue” has been taken to be a word of limitation.] ^(m) Whether the same construction would be applied to bequests of personalty to A *or* his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest, (a difference, however, which no longer exists,) there may seem to be more reason for contending that they are inserted *diverso intuitu*. The strong tendency of the modern cases ^{“Or” read as introducing a substituted gift.} certainly is to consider the word “or” as introducing a substituted gift in the event of the first legatee dying in the testator’s lifetime: in *other words, as inserted in prospect of, and with a view to guard against, the failure of the gift by lapse.

Thus, in *Davenport v. Hanbury*, ⁽ⁿ⁾ where the bequest was to A *or* her issue, it seems to have been taken for granted that the ^{To A or her issue.} word *or* was intended to substitute the issue in case of the death of A in the testator’s lifetime; the question discussed being, not *whether* issue were entitled, but *how*, *i. e.*, whether *per stirpes* or *per capita*. So, in *Montagu v. Nucella*, ^(o) where legacies were bequeathed to the testator’s nephews and nieces, “*or* to their respective child or children,” Lord Gifford, M. R., ^{To legatees, or to their respective child or children.} held the effect to be to vest the legacies absolutely in the children surviving the testator, and that the children were let in only as substitutes for their parent or parents dying in the testator’s lifetime. And in *Gittings v. MacDermott*, ^(p) where a testator bequeathed certain stock to the children of his sister, the late Elizabeth Wall, ^{To the children of A or to their heirs.} *OR to their heirs*, Sir J. Leach, M. R., con-

^(l) *Read v. Snell*, 2 Atk. 642; *Wright v. Wright*, 1 Ves. 409; [*Harris v. Davis*, 1 Coll. 416; *Greenway v. Greenway*, 2 D., F. & J. 128; *Adshead v. Willetts*, 29 Beav. 358.

^(m) *Parkin v. Knight*, 15 Sim. 83; but of course not where substitution, and not succession, is clearly intended, see *Speakman v. Speakman*, 8 Hare 180.]

⁽ⁿ⁾ 3 Ves. 257; see also *Crooke v. De Vandes*, 9 Ves. 199; [and see the same force attributed to the word *and* in *Burrell v. Baskerfield*, 11 Beav. 534; *Tucker v. Billing*, 2 Jur. (N. S.) 483. *Sed qu.* as to the last case.]

^(o) 1 Russ. 165.

^(p) 2 My. & K. 69.

sidered it to be clear that the word "or" implied a substitution, and that the next of kin (who in regard to personalty, were considered to be designated by the word heirs) of such of the legatees as died in the testator's lifetime were entitled to their legacies; and Lord Brougham on appeal, affirmed the decree.

These cases, [which have been repeatedly followed,] (g) are inconsistent with, and therefore have overruled *Newman v. Nightingale*, (r) where a sum of £500 was bequeathed to the sole use of A *or of her children* forever; and Lord Thurlow held, that the true construction of the words was, to give A an interest for life, and the children to take it amongst them at her death.

Where, however, the words in question are applied to a bequest which may not take effect in possession on the testator's decease, another point presents itself, namely, whether the word "or" (admitting it to be introductory of a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's lifetime, or that of his dying in the interval between the death of the testator and the vesting in possession. *Such a question occurred in *Girdlestone v. Doe*, (s) where a testator bequeathed £40 per annum to A for life, and after her decease to B *or his heirs*; and it was held that B, who survived the testator, did not take the absolute interest, but that the latter words created a substitutional gift for his next of kin in the event of B dying in the lifetime of A. (t)

[But if the gift be to the specified persons "or their heirs *or assigns*," it is clear that the words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest. (u)]

[(g) *Whitcher v. Penley*, 9 Beav. 477; *Penley v. Penley*, 12 Id. 547; *Chipchase v. Simpson*, 16 Sim. 485; *Salisbury v. Petty*, 3 Hare 86; *Doody v. Higgins*, 9 Hare App. 32; *Jacobs v. Jacobs*, 16 Beav. 557; *Amson v. Harris*, 19 Id. 210; *Sparks v. Restal*, 24 Id. 218; *In re Craven*, 23 Id. 333; *Timins v. Stackhouse*, 27 Id. 434; *In re Porter's Trust*, 4 K. & J. 188; *Blundell v. Chapman*, 33 Beav. 648; *Margitson v. Hall*, 10 Jur. (N. S.) 89; *Finlason v. Tatlock*, L. R., 9 Eq. 258; *Holland v. Wood*, L. R., 11 Eq. 91.]

(r) 1 Cox 341.
(s) 2 Sim. 225; see also *Corbyn v. French*, 4 Ves. 418; [*Tidwell v. Ariel*, 3 Mad. 403;] *Hervey v. M'Laughlin*, 1 Price 264; [*Price v. Lockley*, 6 Beav. 180; *Salisbury v. Petty*, 3 Hare 86.]

(t) The further discussion of the point suggested by this case, however, will more properly find a place in ch. XLIX.

[(u) *In re Walton's Estate*, 8 D., M. & G. 173; *In re Hopkins' Trust*, 2 H. & M. 411.

Here we may distinguish those cases where, under a power to appoint in favor of A *or* B (A and B being either classes or individuals), a gift in default of appointment is implied between A *and* B. (x) This is an apparent but not a real change of "*or*" into "*and*;" the true reason that A and B both take being that both are objects of the power, and no selection having been made by the person empowered to select, the court divides the subject of gift equally between the objects of the power. (y) Again, a gift to A for life, and after his death to a class of persons "*or* the issue of such of them as shall then be dead, (z) or to A for life, and after his death to such of a class as shall be then living or *their* next of kin" (or "*heirs*"), will generally be construed to mean, such of the class as shall be living at the death of the tenant for life, *and* the issue or next of kin (or heirs) of such as shall then be dead.] (a)

Power to appoint to A or B. Implied gift to A and B in default.

The word "*and*," too, is sometimes construed *or*. This change (being the converse of that which is exemplified by the preceding cases, [but, like it, generally made to favor the vesting of a legacy, and not to divest it],) (b) may be called for by the general frame and context of the will, [as in *Jackson v. Jackson*, (c) where a testator bequeathed a leasehold house to his wife for her life: "*and* after her death, if my son R. shall be living, then to him" for his life, "*but* if he should be living at the time of the death of my wife, *and* shall then or hereafter have any issue male of his body, then all the right therein to go to R.; but if R. should die in the

As to turning "*and*" into *or*.

(x) *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Longmore v. Broom*, 7 Ves. 124; *Burrough v. Philcox*, 5 My. & Cr. 73; *White's Trust*, Joh. 656; *Penny v. Turner*, 15 Sim. 368, 2 Phil. 493, overruling *Jones v. Torin*, 6 Sim. 255.

(y) 7 Ves. 128; 2 Phil. 495. The power is exclusive, *Ib.* and *In re Veale's Trusts*, 4 Ch. D. 61, 5 Ch. D. 622.

(z) *Shand v. Kidd*, 19 Beav. 310.

(a) *King v. Cleaveland*, 26 Beav. 26, 4 De G. & J. 477; *In re Philps' Will*, L. R., 7 Eq. 151; *Burton v. Hellyar*, L. R., 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. D. 658. But in *Lachlan v. Reynolds*, 9 Hare 796, "*their*" was strictly construed as referring to the "*children then living*," so that "*heirs*" must if anything necessa-

rily be deemed a word of limitation, and *or* be read *and*, which was confirmed by another gift to the children living at another period *and* their heirs.

(b) See per Wood, V. C., *Day v. Day*, Kay 708; *Maddison v. Chapman*, 3 De G. & J. 536.

(c) 1 Ves. 217. This is an analogous case to *Grant v. Dyer*, 2 Dow 87, *ante* p. *513. The L. C. added, that if R had survived the wife, but had no issue then living, he would have taken only a life interest, and that by the express words of the gift; so that it seems the court, in effect, struck out of the clause introducing the bequest over the words "*if he should be living at the time of my wife's death*."

life of my wife without leaving issue male," then over: Lord Hardwicke thought it clear on the face of the will that the testator did not intend the property to go over unless R. died in the lifetime of the wife without issue male; and to effect this end he construed "and" as "or;" so that, although R. died in the lifetime of the wife, yet, as he left issue male, he took the estate absolutely.

So, in *Hetherington v. Oakman*, (d) where the ultimate bequest after the failure of certain prior interests under the will, was to the testator's nephews and nieces *and* such of them as should be then living, it was impossible, upon any reasonable construction, to read the word "and" otherwise than as "or." So if a testator give a power to be exercised by A *and* his heirs *and* assigns, the words as they stand requiring the heirs to join with the ancestor, would prevent a sale being ever made at all; for "*nemo est hæres viventis*:" "and" must therefore be read disjunctively. (e)

And where a testator made a bequest after a specified period "to such of his grandchildren *and* their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator. (f)

The change may also be called for] by the circumstance that a literal adherence to the testator's language occasions that one member of his apparently copulative sentence is included in, and, therefore, reduced to silence by another. On this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried *and* without issue.

Thus, in *Wilson v. Bayly*, (g) where a testator devised certain leasehold lands to trustees, in trust for his son John until his marriage, and then to make provision for his wife; and if John should *have any issue, then to assign the premises to him, to enable him to make provision for his children; and if John should happen to have no issue lawfully begotten, in trust for testator's son Mark in like manner; it being his intention that, if his son should die before he was married, or, if he were married, and should have no

Unmarried *and*
without issue.

(d) 2 Y. & C. C. C. 299; see also *Haws v. Haws*, 1 Ves. 13, 1 Wils. 165; *Stubbs v. Sargon*, 2 Kee. 255; *Stapleton v. Stapleton*, 2 Sim. (N. S.) 216; *Davidson v. Rook*, 22 Beav. 206.

(e) *Jones v. Price*, 11 Sim. 557; see acc. Sugd. Pow. 844, pl. 24, 8th ed.

(f) *Maynard v. Wright*, 26 Beav. 285.]

(g) 3 B. P. C. Toml. 195.

issue lawfully begotten, then the lands should be enjoyed by Mark; and in case both his sons, Mark and John, should “happen to die unmarried, *and* neither of them should have any issue lawfully begotten,” then over. Mark died unmarried. John married, but had no issue. The devise over was held to have taken effect, the clause being construed in the disjunctive.

So, in *Hepworth v. Taylor*, (*h*) a bequest over, in case the legatees died unmarried *and* without issue, was held to take effect on the death of one married but without leaving issue.

Again, in *Maberley v. Strode*, (*i*) where the bequest was in trust for the testator’s son A for life, and after his decease for his children; but in case he should die unmarried *and* without issue, or having issue, they should all die, if sons, before they attained twenty-one, or, if daughters, before they attained twenty-one or were married, then over. A married, but died without issue; and Sir R. P. Arden, M. R., held that the gift over took effect.

So, in *Bell v. Phyn*, (*k*) where a residue was bequeathed equally between the testator’s three children, and in case of the death of any of his children, (without being married *and* having children,) the share of the child so dying to be divided between the surviving children—Sir W. Grant, M. R., on the authority of the last case, held, that the word “and” was to be construed *or*, for as, legally speaking, there could be no children without a marriage, it was almost necessary, in order to give effect to all the words, to construe the copulative as disjunctive. [However, the daughter whose share was in question having married and also had a child, it was unnecessary to decide the point.]

And in *Mackenzie v. King*, (*l*) where real and personal property was given in trust for A for life, and after her death for her children; but in the event of her not intermarrying *nor* having children, then the same property to be subject to her disposal by will or otherwise; Sir K. Bruce, V. C., held that “nor” (the component parts of which are “and not”) must be read “or not,” and that the fund was at A’s disposal, in the event either of her remaining single, or marrying and not having a child.]

*But though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is

(*h*) 1 Cox 112.

(*i*) 3 Ves. 450.

(*k*) 7 Ves. 459.

(*l*) 12 Jur. 787, 17 L. J., Ch. 448.

rendered inoperative, (since the fact of being unmarried includes the not having or leaving issue, which always means *lawful* issue,) yet, on the other hand, the disjunctive construction reduces to silence the word "unmarried;" for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words, if the estate is to go over on the non-happening of *either* of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone. In these cases, it will be observed, the disjunctive construction can never operate to let in the devisee over to the exclusion of the children or issue of the first taker, as in the class of cases before noticed; which accounts for the seeming anomaly of torturing the words in both instances to produce a contrary effect. [But since *Grey v. Pearson* (*m*) the cases last noticed have lost much of their weight as authorities for applying to any given case the rule which would change "and" into "or" in order to prevent one member of a compound sentence being rendered inoperative. Though it be a canon of construction that effect is if possible to be given to every word used, it is one which must bend to circumstances; (*n*) and where the result of changing *and* into *or* would be only to render one member of the sentence inoperative instead of the other, the change certainly ought not to be made. (*o*) It does not appear to have been made in any case since *Grey v. Pearson*; which indeed was treated by Sir J. Romilly (*p*) as having overruled *Bell v. Phyn* and *Maberley v. Strode* as well as *Brownsword v. Edwards*.

(*m*) 6 H. L. Cas. 61.

(*n*) Per Lord Cranworth in *Clarke v. Colls*, 9 H. L. Cas. 612; and in *Earle v. Barker*, 11 H. L. Cas. 280, Lords Cranworth and Chelmsford (agreeing with Romilly, M. R., 33 Beav. 353) preferred construing an ambiguous clause, forming one member of a copulative sentence, in a way that rendered it inoperative to changing "and" into "or." Lord Westbury would have preferred the latter course; but both led to the same decision.

(*o*) In *re Kirkbride's Trusts*, L. R., 2 Eq. 400.

(*p*) In *Secombe v. Edwards*, 28 Beav. 440: and see L. R., 1 Eq. 680.] *Maber-*

ley v. Strode, and *Bell v. Phyn*, were much canvassed in *Dillon v. Harris*, 4 Bligh (N. S.) 329; where Lord Brougham seemed very reluctant to consider them as general authorities for turning into *or* the word "and," occurring in a limitation over, in case of the prior legatee dying unmarried and without leaving lawful issue; he thought Sir W. Grant, in deciding *Bell v. Phyn* upon the authority of *Maberley v. Strode*, did not sufficiently advert to the special circumstances of the latter case. *Dillon v. Harris*, however, did not raise the point, as the prior bequest was to take effect upon the legatee marrying with consent, and the bequest

*The decision in *Grey v. Pearson* is sometimes referred to as if the rule that words are *prima facie* to be taken in their ordinary and grammatical sense was new, and as if a more strict and literal construction was now generally required than had previously obtained. But the rule is an old one. (q) The application of it in that particular case was strict, and within its particular scope the decision is of course conclusive: but that no new principle of general application has been introduced by it is shown by the subsequent decision of D. P. in *Abbott v. Middleton*, (r) and by other cases noticed above.] (s)

Grey v. Pearson and Abbott v. Middleton.

The word *unmarried* means either never having been married, or not having a husband or wife at the time. The former is its ordinary signification; and it was considered as so used in the cases stated above, (t) where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense, (u) which has a twofold advantage, that it removes the necessity of changing the particle "and" to "or," and gives effect to all the testator's words.

Whether "unmarried" means not *having been married*, or not being married at the time.

Thus, in *Doe d. Everett v. Cooke*, (x) where the bequest was to B and his assigns (after the death or marriage of A) for his life, and after his decease then to the child or children of B by any future wife, his, her, or their executors, administrators and assigns; but the testator declared his will to be upon

"Unmarried" construed to mean not *having husband or wife at the time.*

over was in case he should so die unmarried and without leaving lawful issue; which Lord Brougham thought referred to such a marriage as had been previously referred to, namely, marriage with consent; and as the legatee had married without consent and had left no issue, (so that, even according to the disjunctive construction, the bequest over failed,) the question did not arise.

[(q) See ch. LI.

(r) 7 H. L. Cas. 68, *ante* p. *488; where Lords Cranworth and Wensleydale were again opposed to Lord St. Leonards, but were not on this occasion in a majority.

(s) Pp. *493, *494.

(t) P. *519. So construed also in *Rad-*

ford v. Willis, L. R., 7 Ch. 7; where the devise was to an unmarried daughter for life, with remainder in fee to "her husband," and a gift over if she died "unmarried;" for the remainder which (it was held) vested in the husband on marriage (see above, p. *324), was not to be defeated by the accident of his dying first.]

(u) The word "unmarried" is used in this sense in the stat. 3 W. & M., c. 11, § 7, which provides, that, "if any *unmarried* person, not having a child, or children, shall be lawfully hired," &c.; as no one, *not having been married* can have children in the legal sense.

(x) 7 East 269.

this further condition, that in case B should die an infant unmarried and without issue, then over to C and his children. B attained his majority, and died, leaving a widow, but without having had issue; and it was held, that in these events the gift over failed. Lord Ellenborough said, "The most rational construction we can give this will is, to construe it as Lord Hardwicke did the devise in *Framlingham v. Brand*, (y) as one contingency, namely, B's dying an infant, attended with two qualifications, viz. his dying **without leaving a wife surviving him*, or dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the statute of distribution with the next of kin, or that B should be able to make a testamentary disposition in her favor; meaning, also, that if he left children, they should have the estate in preference to the wife; and that if he left neither wife nor children at his death during his minority, C and his children should have the estate; but that if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children."

So, in *Doed. Baldwin v. Rawding*, (z) where a testator devised his lands to his daughter and any other children he might leave, and to her or their heirs and assigns forever; but in case his daughter and such other children as aforesaid should die *under the age of twenty-one years unmarried and without lawful issue*, then to his wife in fee. The daughter died under age and without issue, but leaving a husband surviving; and it was held, on the authority of the last case, that the devise over failed.

[As B in the former case left a wife and the daughter in the latter case left a husband surviving, neither of them was "unmarried" in any sense, and it was therefore unnecessary to decide upon the actual meaning of the word. The former case shows the opinion of Lord Ellenborough; but in the latter, Bayley and Holroyd, JJ., seem to have thought that either of the two meanings might be ascribed to it according to the context, and Lord Cottenham was of the same opinion. (a)]

(y) 3 Atk. 390.

(a) *Maugham v. Vincent*, 9 L. J. (N.

(z) 2 B. & Ald. 441. [See also *In re Sanders' Trusts*, L. R., 1 Eq. 675.

Where personal property is limited, in case of the death of a married woman in her husband's lifetime, to such persons as would have been entitled thereto in case she had died intestate and unmarried, the word "unmarried" is always held to mean, "not having a husband at the time of her death." (b) To ascribe to the word its other meaning would plainly exclude the children of the marriage; and slight circumstances, such as an express provision made for the children in another part of the *will, either out of the same, (c) or a different (d) fund, will not control the rule. And this construction has been even extended to cases where the phrase used was "die without having been married." (e)

Limitation to next of kin of feme covert as if she had died "unmarried."

And the mere circumstance that the woman is unmarried at the date of the will does not supply a reason for putting a different construction on the word, since when it occurs with such a context it is clear that her marriage at some future time is contemplated. (f) On the other hand, where a legacy is given to a person who at the date of the will has never been married, and the gift is made conditional on the legatee being "unmarried," it may well be that the testator intends the legacy to be conditional on the continuance of the legatee in the same *status*. And if the purpose of the legacy be to provide the testator's unmarried daughter with an outfit, and he speaks of her (though in a different part of the will) as "still unmarried," the intention is put beyond a doubt. (g)

Gift to person not married at date of will on condition of her being unmarried.

The term "unmarried" is a *designatio personæ*; and, if once a person is entitled to participate in a fund by filling the character of an

(b) *Maughan v. Vincent*, *supra*; see also *Hoare v. Barnes*, 3 B. C. C. 317, ed. by Eden, n. (a); *Hardwick v. Thurston*, 4 Russ. 380; *Pratt v. Mathew*, 22 Beav. 328, 8 D., M. & G. 522; *In re Gratton's Trusts*, 3 Jur. (N. S.) 684, 26 L. J., Ch. 648; *In re Saunders' Trust*, 3 K. & J. 152. In the last case the words occurred in a settlement on a first marriage and were made to include the event of the wife surviving the husband. She survived him, married again, and died before her second husband. The children of the second marriage were held entitled.

[(c) *Coventry v. Earl of Lauderdale*, 10 Jur. 793; *Pratt v. Mathew*, *sup.*; *Clarke Colls*, 9 H. L. Cas. 601, affirming

Mitchell v. Colls, 9 Johns. 674. Where the provision for children is in all events absolute, the question cannot arise; for they take under the express gift to them.

(d) *In re Norman's Trust*, 3 D., M. & G. 965.

(e) *Wilson v. Atkinson*, 4 D., J. & S. 455; *In re Ball's Trust*, 11 Ch. D. 270.

(f) *Day v. Barnard*, 1 Dr. & Sm. 351. It is to be observed that all the cases on this point, except this and *In re Gratton's Trusts*, have arisen on marriage settlements.

(g) *In re Thistlethwayte's Trust*, 24 L. J., Ch. 713; and see *Heywood v. Heywood*, 29 Beav. 9.

unmarried person, he will not lose that right if he subsequently marries. (*h*)

It has already been observed that in the majority of cases where "And" not construed "or" where a previous gift would be thereby divested. "and" has been construed disjunctively, it has been in order to favor the vesting of a legacy, and not in order to defeat a previously vested gift; and generally it will not be so construed where the latter consequence would follow; as, where the bequest is to A for life, remainder to his eldest son (or to his children), with a gift over if A should die under twenty-one and without issue (or under twenty-one and without children). (*i*) Again in *Day v. Day*, (*k*) where a testator bequeathed the interest of his residuary personal estate to his wife for life, and after her *death to his brother for life, and after the death of the survivor, the capital to A, subject to the payment of £1000 each to B, C and D, which the testator gave to them to be paid to each of them at the end of twelve months next *after the decease of the survivor* of his wife and brother; provided, that if either of the said B, C and D should die "in the lifetime of my said wife *and* my said brother," his legacy should lapse. Sir W. P. Wood, V. C., refused to read "and" as "or," and thereby cause a lapse of B's legacy, who had survived the wife but died before the brother. (*l*) And this is independent of *Grey v. Pearson*.]

(*h*) *Jubber v. Jubber*, 9 Sim. 503; see *Niblock v. Garratt*, ante p. *324; *Hall v. Robertson*, 4 D., M. & G. 781. *bride's Trusts*, L. R., 2 Eq. 401; *Reed v. Braithwaite*, L. R., 11 Eq. 514; *W— v. B—*, 11 Beav. 621.

(*i*) *Malcolm v. Malcolm*, 21 Beav. 225; *Key v. Key*, 1 Jur. (N.S.) 372. See also *Coates v. Hart*, 32 Beav. 349, 3 D., J. & S. 504, 516. (*l*) It was held that "die in the lifetime of my said wife and my said brother" meant "die in their *joint* lifetime:" and *Brudnell's case*, 5 Co. 9, was cited.]

(*k*) *Kay* 703. See also *In re Kirk-*

[*524]

*CHAPTER XVII.

ESTATES ARISING BY IMPLICATION. (a)¹

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| <p>I. <i>Effect of Recitals.</i></p> <p>II. <i>Implication from Devises and Bequests on death of a person simply.</i></p> <p>III. — <i>on Death combined with some Contingency, and under other varieties of Context.</i></p> | <p>IV. <i>As to implying Trust from Devise of Legal Estate.</i></p> <p>V. <i>Implication from Powers of Selection and Distribution.</i></p> <p>VI. <i>Implication of Estates Tail.</i></p> <p>VII. <i>Implication of Gifts to Children.</i></p> |
|---|---|

I.—Sometimes a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator

Recitals, whether they create an actual gift.

[(a) Nothing contrary to law can be implied, per Turner, L. J., 26 L. J. Bankr. 83.]

1. Necessary implication is defined by Lord Eldon, in *Wilkinson v. Adams*, 1 Ves. & B. 456, to mean “not natural necessity but so strong a probability of intention, that an intention contrary to it, which is imputed to a testator, cannot be supposed.” Implication to be effective must be necessary, *Deering v. Adams*, 37 Me. 264; *Grout v. Hapgood*, 13 Pick. 159; *McCoury v. Leek*, 1 McCart. 70; *Post v. Hover*, 33 N. Y. 593; *Chinn v. Respass*, 1 Mon. 25; *Kelly v. Stinson*, 8 Blackf. 387; *Ridgely v. Bond*, 18 Md. 433, 448. And it cannot in any case overrule the express language of the will, 1 Roper on Leg. 724, 730; *Ferson v. Dodge*, 23 Pick. 293; *Willis v. Bucher*, 2 Binn. 455; S. C., 3 Wash. C. C. 369; *Dudley v. Mallery*, 4 Ga. 52; *Lithgow v. Kavanagh*, 9 Mass. 161; *Den v. Cook*, 2 Halst. 41; *Dewitt v. Eldred*, 4 Watts & S. 414; *Moore v. Dimond*, 5 R. I. 122;

Manigault v. Deas, 1 Bailey Eq. 298; *Dixon v. Ramage*, 2 Watts & S. 142; *Wright v. Denn*, 10 Wheat. 204; *Bowers v. Porter*, 4 Pick. 198; *McLellan v. Turner*, 15 Me. 436. The following cases will serve to illustrate the application of the rules, the question becoming in every case one of intention: In *Deering v. Adams*, 37 Me. 264, the executors took an estate by implication from their being put in entire charge of the property for twenty years, during which time no estate was to vest in the heirs. In *Edens v. Williams*, 3 Murph. 27, where there was a gift of certain property to the testator's wife, and if she should prove *enccinte*, such child should be supported and educated out of the income of the property so left her, “as well as all the property I may die possessed of,” with a residuary bequest to nieces, gave the whole estate by implication to the wife and child on its birth. In *McKeehan v. Wilson*, 53 Penna. St. 77, a gift to testator's wife and children for her life, and, if the children

evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favor of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled.²

should die before her, to her, was held to give a remainder by implication to the children contingent on their surviving her. In *Piper's Estate*, 33 Leg. Int. 228, a direction that the mansion-house should not be sold during the daughter's life, but that she might reside in it, was held to give her a life estate. In *Walker v. Whiting*, 23 Pick. 313, a gift of real estate was implied to a trustee from direction to him to pay debts and legacies and the insufficiency of the personal property. In *Hyatt v. Pugsley*, 23 Barb. 285, where there was a devise to A, B and C, and a second devise "to the said last mentioned A, B, C and D," D was not thereby made to participate in the first devise by implication. In *Grout v. Hapgood*, 13 Pick. 159, the homestead was devised to the son subject to a mortgage to be paid off by him, but was sold for the mortgage and other debts by the executors, and it was held that the son had no estate by implication in the surplus proceeds. In *Post v. Hover*, 33 N. Y. 593, reversing 30 Barb. 312, an appointment by will of A to be the guardian of B, and, "as such guardian," to have charge of the estate during B's minority, gave A no estate by implication. In *Roosevelt v. Fulton*, 7 Cow. 71, annuities to be paid out of the profits "from my steamboats or any other property real or personal," gave no estate by implication. In *Crane v. Doty*, 1 Ohio St. 279, the heirs were not disinherited by implication as to property not devised by their express exclusion in the will as to certain other property devised. In *Manigault v. Deas*, 1 Bailey Eq. 298, it was held that the terms of a devise to

one daughter should not qualify by implication the devise made without such terms to another daughter.

2. In *Marsh v. Hague*, 1 Edw. 174, a gift to testator's cousin A, "the daughter of my uncle B, \$1000 more than the equal part above mentioned to my uncle B's children," gave B's children by implication the share which had been omitted. Mr. Theobald, in his treatise on wills, page 420, classifies implications by recital as follows: "(1.) A recital, that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Harris v. Harris*, 1 R., 3 Eq. 610; *Circuit v. Perry*, 23 B. 275. (2.) But a recital that the testator has by the very instrument containing the recital made a particular gift, which he has not in fact made, is evidence of an intention to confer the bounty. *Adams v. Adams*, 1 Ha. 537. Thus a gift alleged to be 'in addition' to a prior gift, where there is in fact no such prior gift, is sufficient evidence of an intention to confer the supposed prior gift. *Jordan v. Fortescue*, 10 B. 259; *Farrar v. St. Catharine's Coll.*, 16 Eq. 24. So a statement that the testator does not give a legatee a certain sum because she is absolutely entitled to it, when in fact it is in the disposition of the testator, amounts to a gift of the sum in question. *Hall v. Leitch*, 9 Eq. 376. But a mere recital in a codicil of a supposed gift by will will not amount to a gift. *Re Arnold's Estate*, 33 B. 163, 171. (3.) In order that rule 2 may apply it must be clear that there is nothing in the will to

Thus, where (b) a testator bequeathed unto A, his wife, £600, to be paid to W, saying it was for payment of lands lately purchased of W, *and was already estated as part of a jointure to A his wife during her life*, being of the value of £67 *per annum*; that of Wiskow, York, and Malton, the lands there amounting to the yearly value of £63, in all £130, which *being also estated upon A his wife, was in full of her jointure*. It appeared that these lands had not been settled on the wife. And it was held by Pollexfen, C. J., Rokeby, and Ventriss, (Powell, J., *dissentiente*), that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was estated in it *before." Powell, J., relied upon a case (c) in which "I have made a lease to J. S., at 10s. rent," was held to be a good devise; but the other judges considered the case to be of little authority.

So, where (d) J. S., tenant for life, with remainder to his wife for life, remainder to his own right heirs, expressed himself in his will as follows: "*Item*, my land at W. my wife Mary is to enjoy for her life, and after her death it of right goes to my daughter E. forever, provided she has heirs." The court held that the first clause was not a devise to the wife, for the lands were settled upon her for life; and what was said as to the daughter was only a declaration of the deviser what the condition of the estate was, and how she was to enjoy it; and he could not say of right who was to enjoy them, if she claimed under the will.

Again, where (e) B, by his will, reciting that he was entitled for life, under the will of A, to the advowson of the rectory of D, with remainders over, "subject to a direction in the said will, that my brother J. D. shall be presented to said rectory when it shall next

which the recital can refer. *Sherratt v. Oakley*, 7 T. R. 492; *Smith v. Fitzgerald*, 3 V. & B. 2; *Mackenzie v. Bradbury*, 35 B. 617, 620; *Nugent v. Nugent*, 1 R., 8 Eq. 78; *Ives v. Dodgson*, 9 Eq. 401. (4.) Still less can a gift be implied from a recital, when the effect of such implication would be to cut down a prior express gift, as from a recital of a gift to B for life, remainder to his children, when in fact the prior gift was to the children immediately. *Re Smith*, 2 J. & H. 594."

(b) *Wright v. Wyvell*, 2 Vent. 56.

(c) *Moore* 31.

(d) *Wright alias Right v. Hammond*,

1 Stra. 427, 1 Com. Rep. 231, 8 Vin. Abr. 110, Devise, L 2, pl. 32, 2 Eq. Ab. 338, pl. 11.

(e) *Dashwood v. Peyton*, 18 Ves. 27; and see *Doe d. Vessey v. Wilkinson*, 2 T. R. 209, stated ch. XXV., § 3; [*Lane v. Wilkins*, 10 East 241, ante p. *201. See also *Smith v. Maitland*, 1 Ves., Jr., 362; *Langslow v. Langslow*, 21 Beav. 552; *Circuit v. Perry*, 23 Beav. 616; *Box v. Barrett*, L. R., 3 Eq. 244.] But see also *Poulson v. Wellington*, 2 P. W. 533; *Wilson v. Piggott*, 2 Ves., Jr., 351; both which, however, arose on dispositions by deed.

become vacant, which it is my wish may be complied with; now, I hereby declare it to be my desire and earnest wish, that in case upon the vacancy of the said living the said J. D. shall not be then living, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted said presentation, then" A. P. was to be presented. The fact was, that, under the will of A, J. D. was only entitled to the presentation on a certain contingency, which had not happened. The question then arose, whether the expressions in the will of B raised a gift in him by implication, so as to put the persons actually entitled under the will of A, who took benefits under the will of B, to their election. Lord Eldon decided in the negative, observing that he found no authority for holding mere recitals, without more, to amount to gift, or demonstration or intention to give.

[And in *Adams v. Adams*, (f) a devise and bequest to trustees *of real and personal estate, subject to the dower and thirds at common law of the testator's wife in and out of his real estates, (the testator's interest therein being an equity of redemption and not liable to dower,) upon trust to receive the income, and pay the same or the overplus thereof after deducting the dower or thirds of his said wife for the maintenance of his children, was held not to give the wife by implication a rentcharge equal to what dower out of the whole estate would have amounted to.]

Reference by
testator to a
disposition
made in that
his will.

It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated. [In such cases "the court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication."](g)

[(f) 1 Hare 537; see also *Doolan v. Smith*, 3 J. & Lat. 547; *Ralph v. Watson*,

9 L. J., Ch. 328; and cf. *West v. Culliford*, 3 Hare 265, where the words were more properly words of original charge

than of recital.

(g) Per Wigram, V. C., *Adams v. Adams*, 1 Hare 540; and per Lord Brougham, *Yates v. Thomson*, 3 Cl. & Fin. 572. The difference appears to have been over-

Thus, where (*h*) a testator bequeathed one moiety of certain leasehold estates to E; and if she should die before twenty-one, to G; and if he should die before a certain event, to another person; and after her death, to A; and provided that in case A should die without issue, and E or G should be then living, or either of them, the *said* moiety of his leasehold messuages, *before given to the said A, should go to E and G*. Sir T. Sewell, M. R., thought it quite clear that the second devise related to the other moiety not before devised, as the manner in which it was given was inconsistent with the disposition of the first moiety, which A was not to take until after the death of E and G. He further held, that the court would imply a gift of the second moiety to A and her issue, [(the issue taking, since, there was no gift over except on the death of A without issue,)] with contingent limitations over. There could, he said, be no doubt of the intention, and the words of gift being omitted by mistake, the court would supply them.

*[“Implication,” said Lord Westbury in *Parker v. Tootal*, (*i*) “may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction.” The case in which this was said affords an example of the former kind of implication, a devise “to the first son of T. severally and successively in tail male” being read as a devise “to the first and every other son;” otherwise the phrase “severally and successively” would have been without meaning.

Implication of the latter kind described by Lord Westbury is seen when from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those per-

looked in *Hall v. Lietch*, L. R., 9 Eq. 376. A direction to pay debts, including one described as owing by the testator but overstating its amount, will generally belong to the latter category mentioned in the text, and not entitle the creditor

to the larger amount, *Wilson v. Morley*, 5 Ch. D. 776.]

(*h*) *Bibin v. Walker*, Amb. 661. [As to *Frederick v. Hall*, 1 Ves., Jr., 396, *qu.*

(*i*) 11 H. L. Cas. 143, 161.

sons has been implied ; (*k*) or when from a direction to invest real and personal estate is implied a trust to sell the real estate. (*l*)

But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property. (*m*)

Again, in *Jordan v. Fortescue*, (*n*) under a gift by codicil of "£500, in addition to £1500 before bequeathed" to the same person, there having, in fact, been only two legacies of £500 each bequeathed to him by will and first codicil, it was held that there was a gift by implication of £2000. But it must be remembered, that though words such as those used in the last case may by implication effect an increase in the amount of the first gift, yet the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having any operation where their effect would be by implication to diminish the first gift. (*o*)

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him. Thus, in *Ouseley v. Anstruther*, (*p*) where a testator, reciting that under a settlement his wife would have an income of £1560, directed his trustees to add an annuity of £440, so as to raise his wife's jointure to £2000 ; the income under the settlement being less than was supposed, the wife was, nevertheless, held entitled to have it made up to £2000. In the converse case of the income being more than the

Intention to
give what will
make up a
certain sum.

(*k*) See *Ex parte Wynch*, 5 D., M. & G. 221 and cases there cited. See also *Newburgh v. Newburgh*, Sug. Law of Prop. 367 : a devise of the estates in the omitted county (see above, p. *412) was implied from the name and arms clause, the leasing power, and other parts of the context. And see *Langston v. Langston*, 2 Cl. & Fin. 194, and other cases, *ante* p. *491, *et seq.*

(*l*) *Affleck v. James*, 17 Sim. 121.

(*m*) *Wylie v. Wylie*, 1 D., F. & J. 410.

See also cases cited ch. XXXIII., § 4, showing the inefficacy of the word "estate," occurring in the introductory clause of a will to pass the fee-simple.

(*n*) 10 Beav. 259 ; see also *Hayes d. Foorde v. Foorde*, 2 W. Bl. 698 ; *Edmunds v. Waugh*, 4 Drew. 275 ; *Farrer v. St. Catharine's College*, L. R., 16 Eq. 24.

(*o*) *Mann v. Fuller*, Kay 624 ; *Gordon v. Hoffman*, 7 Sim. 29, *ante* p. *181.

(*p*) 10 Beav. 459. Compare *Thompson v. Whitelock*, 5 Jur. (N. S.) 991.

testator supposed, the wife would have been entitled only to the £2000. (q)

And in *Ives v. Dodgson*, (r) a testatrix, upon a contingency which (as she showed by her will) she expected not to be (and which was not) ascertained until after her own death, bequeathed a life annuity of £40 to A; she then bequeathed to A £30 free of duty, and afterwards by codicil said, "I increase the *immediate* annuity of £30 left by my will to A to an annuity of £50 duty free." It was held by Sir W. James, V. C., that the plain meaning of the words of the codicil was that A was to have an annuity of £50 in addition to the contingent annuity of £40.

In these cases, it will be noticed, there were words of gift as well as of recital.]

And even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail. An early case (s) presents a very nice question of this nature.

A testator having issue by C. three daughters, S., A. and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying to the heir 10s. during the term, and to the rest, after fifteen years old, 20s. apiece, and the heir to pay to A. and E. £100 apiece, £40 at the decease of the wife, &c.; and if S. his heir died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E., &c. *It was argued that S. took nothing under the will by implication, there being no express devise to her. But, on the other side, it was contended that S. was sole heir; for it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise A., the younger daughter, would have equal share in the land and also the legacies. Hale, C. J.—"The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore,

Reference to a person as heir held to create a devise by implication to that person.

(q) *Milner v. Milner*, 1 Ves. 106; *Trevor v. Trevor*, 5 Russ. 24.

(r) L. R., 9 Eq. 401.]

(s) *Tilley v. Collyer*, 3 Keb. 589.

albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir." (t)

But the disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

Thus, where (u) a testator, after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate, to other persons. In a codicil, executed on the same day he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his "wife and her assigns, in the premises at *Wrentnall*, anything in the foregoing will to the contrary notwithstanding." It was contended, that the widow was entitled to the Wrentnall estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the court decided against the widow's claim. Lord Kenyon said, that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word "Wrentnall" was written in the codicil instead of the word "Northwood."

[So in *Vaughan v. Foakes*, (x) where a testatrix bequeathed *the residue of her estate to A, and by a codicil, reciting that gift, and that A might die before her, she in that case appointed B and C her residuary legatees; and afterwards the testatrix made a second codicil to "her former one," as follows:—"As the death of Mrs. W. (the mother of B and C) has taken place, and as her two children will ultimately become my residuary legatees, the £15 she was to have I give to D." It was held by Lord Langdale, M. R., that the first codicil was not disturbed by the second. "There is a misrecital," he said, "of what she had previously given; she recites that as an absolute which is only a contingent gift; if the word *may* had been used, instead of

(t) See *Taylor v. Webb*, Sty. 331, *ante* p. *357, n.; [*Parker v. Nickson*, 1 D., J. & S. 177. Compare *Jackson v. Craig*, 15 Jur. 811.]

(u) *Skerratt v. Oakley*, 7 T. R. 492.

[(x) 1 Kee. 58; see also *Bamfield v.*

Popham, 1 P. W. 54, 2d point; In re *Smith*, 2 J. & H. 594; In re *Arnold's Estate*, 33 Beav. 163; *Richardson v. Power*, 19 C. B., (N. S.) 780 (on same will); *MacKenzie v. Bradbury*, 35 Beav. 617.

will, the recital would have been in exact conformity with the prior gift."

But this principle of construction is not confined to the case of a will and codicil; it has also been applied to a misrecital occurring in the same instrument as the disposition sought to be disturbed. Thus, in *Smith v. Fitzgerald*, (y) where a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A., and if any of the legatees died before him he gave their legacies to S., and "after all the legacies are paid, (except those mentioned from the nabob's debt, as they may require time,) all such balance as shall remain overplus (exclusive of the nabob's, *willed to S.*) to be equally divided among the trustees," it was held by Sir W. Grant, M. R., that the residue of the debt not exhausted by the legacies was not given to S. by implication. He said, "The language refers to something as already done, something that he had given or supposed he had given to S. If in the preceding part there was nothing that could in any way answer the description of what he here says he had *willed to S.*, there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently made may amount to a gift, the court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest."

Misrecital of disposition in the same instrument.

Where, however the terms of the prior disposition are themselves ambiguous, their construction may properly be guided by a recital couched in more precise language in a codicil. Thus, in *Darley v. Martin*, (a) where a testator bequeathed leaseholds to A for life, and after her death to her issue, and "in default of such issue," to B; and, by a codicil, recited that he had bequeathed the leaseholds to B after the death of A and "in default of her *leaving* lawful issue;" it was held, that the gift over in the will being capable of importing a bequest over if no issue were living at the death, it ought to be inferred that the testator employed it in

Ambiguity in will controlled by recital in codicil.

(y) 3 Ves. & B. 2; see also *Phillips v. Brougham*, 10 Cl. & Fin. 17; *Grover v. Chamberlaine*, 4 Ves. 51. *Raper*, 5 W. R. 134.]

(a) 13 C. B. 683; see also per Lord

that sense, because in the codicil he referred to it as if it were a gift over in default of A's *leaving* issue.]

II.—It is a well-known maxim, that an heir-at-law can only be disinherited by express devise or necessary implication,³ and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed. (b) In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise *to the testator's heir* after the death of A, will confer on A an estate for life by implication; but that, under a devise to B, *a stranger*, after the death of A, no estate will arise to A by implication. (c)⁴ This is an exact illustration of the

3. *Roosevelt v. Fulton*, 7 Cow. 71; *Jackson v. Scauber*, 7 Cow. 187; *Van Kleeck v. Dutch Ref. Ch.*, 6 Paige 600; *Bender v. Dietrick*, 7 Watts & S. 284; *Den v. Birdsall*, Spenc. 244.

(b) 1 Ves. & B. 466; "necessary implication is that which leaves no room to doubt," per Lord Mansfield, in *Jones v. Morgan*, Fearn, C. R. App., No. III.; and see 3 Ves. 113.]

(c) Year Book, 13 Hen. VII., fol. 17: Bro. Ab. Dev., pl. 52; 8 Vin. 214, pl. 5; 2 Freem. 270; T. Jon. 98; Vaugh. 263; 1 Eq. Ab. 197, pl. 6; 1 Vern. 22; 2 Vern. 572; 5 Ves. 804; 18 Ves. 40; 1 Mer. 414; 1 S. & St. 544; 5 B. & Ald. 722; 9 B. & Cr. 218; but see, *contra*, 1 P. W. 472; 2 Eq. Ab. 343, pl. 5, 363, pl. 14, which seems inconsistent with, and is overborne by, the mass of authorities. The point, indeed, was not definitively disposed of.

4. In like manner a gift to A "in case

B dies before the expiration of the lease" gives B an estate for the term of the lease by implication, *Holton ads. White*, 3 Zab. 330, 425. But a gift to a stranger, "to be paid after the decease of" testator's widow, does not give her a life estate by implication, *Doughty v. Stilwell*, 1 Bradf. 300. *Contra* where the gift is to the child after the death of the widow, *Kelly v. Stinson*, 8 Blackf. 387. And where an annuity is expressly given to testator's daughters and a provision in the will for dividing the estate *on the death* of his daughters among his grandchildren, the daughters will not take a life estate by implication, *Lovett v. Gillender*, 35 N. Y. 617, affirming *Lovett v. Kingsland*, 44 Barb. 560. So, too, where there is a definite bequest to testator's widow and a residuary gift *on her death*, *McCoury v. Leek*, 1 McCart. 70. And where a gift for life is expressly given to the widow, a

difference between necessary implication and conjecture. In the former case, the inference that the testator intends to give an estate for life to A is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir at the death of A, and yet that the *heir should have it in the meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A as the period when the devise to B was to take effect in possession, the testator intended A to be the prior tenant for life, yet it is *possible* to suppose that, intending the land to go to the heir during the life of A, he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B upon the death of A, raises an implied estate in A; but such *dicta*, even if accurately reported, (which is often doubtful,) cannot weigh against the current of authorities, grounded on acknowledged principles of law. (d)

Devise to the heir after the death of A gives A an estate by implication.

Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise "to my eldest son B after the death of A, would raise an implied estate for life in A, the fact being that B is the heir apparent, though not designatēd as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A and B, devise real estate to B (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A, the elder son, without issue in the testator's lifetime, the younger son (*i. e.* the devisee) had become his heir. On

Devisee need not be described as heir.

Whether devisee must be heir at the death.

gift over on her death, "in case I should have no more children," will not enlarge her estate, *Rathbone v. Dyckman*, 3 Paige 9.

(d) *Ex parte Rogers*, 2 Mad. 455; see

also *Den d. Franklin v. Trout*, 15 East 398, where, however, the person in whose favor it was said the implied gift would have been raised, was himself heir, and the point, therefore, could not have arisen.

the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife *would* take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the *date of the will, and not otherwise. (e) Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

It has been said that the implication arises in the case of a devise as well to one of several coheirs, as to a sole heir; and, therefore, that where a man devises to one of his two daughters, (his coheiresses), after the death of his wife, she (the wife) takes an estate for life by implication. (f) This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to *one* of his coheiresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to *arguendo* as a settled rule of law in another case. (g)

In cases, too, which are the converse of the last, viz., where there is a devise to the heir and other persons after the decease of A, the implication would seem, looking at the reason and principle of the doctrine, not to arise (as there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime). [Accordingly in *Ralph v. Carrick*, (h) where a testator gave all his real and personal property, in trust to be converted

To one of several coheirs.
Devise to heir and others after the death of A.

Ralph v Carrick.

[(e) See acc. *per cur.*, *Ralph v. Carrick*, Rep. 115.

infra.]

(f) *Hutton v. Simpson*, 2 Vern. 723;

S. C., *nom.* *Simpson v. Hornby*, Gilb. Eq.

(g) *Willis v. Lucas*, 1 P. W. 472.

(h) 5 Ch. D. 984, 40 L. T. (N. S.) 505.

and out of the proceeds to pay debts and legacies, and in the event (which happened) of his death without lawful issue, *and after the death of his wife* and payment of debts and legacies, the whole residue of his property real and personal to be divided in specified proportions among the children of his late aunts (naming them), the descendants of any child then dead taking the share of its deceased parent; and he directed the surplus proceeds of his real estate to be invested to provide for the jointure payable to his wife under their marriage settlement. It was held that, although *the testator's coheirs and next of kin (i) were included among the children of his aunts, the wife did not take a life estate by implication. Sir C. Hall, V. C., relied on the circumstance of the gift being to an unascertained class, and also on the clause expressly providing for payment of the wife's jointure out of the very fund in which she claimed a life estate, as repelling the implication. But the L. JJ. proceeded entirely on the general principle that a devise to the heir and another after the death of A will not raise a life estate by implication in A: for as heir he takes the whole, while as devisee he takes a share only. The same principle must it should seem govern the case of a devise after the death of A to one of several coheirs.

Sir H. Cotton pointed out the fallacy of a proposition urged at the bar in this case, and which sometimes of late has been heard even from the bench—that, subject to the established rules, the duty of the court was to construe the will as a person of ordinary intelligence would do, and that no such person would doubt that in this case the testator intended the widow to have a life estate. “Of course,” said the L. J., “we are bound by the rules which have been established by the courts to enable us to say what the words used do mean. Subject to that we are bound to construe the will as trained legal minds. And that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he uses by fancying he must have done what they under similar circumstances think they would have done. That is conjecture only: and conjecture on an imperfect knowledge of the circumstances: because although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known

Theory of construction by “ordinary intelligence.”

[(i) But on this question the widow must be reckoned among the next of kin.]

to the testator are in their minds or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent on him, as their minds are constituted, or that he would have acted in the same way as they. Therefore as lawyers we must construe the will like any other document," with one difference only, namely, that technical words are unnecessary in a will.

In the previous] case of *Blackwell v. Bull*, (*k*) where a testator *devised in the following words: "In the first place, my will and wish is, that my business of a cheesemonger be carried on by my wife and my son jointly for the mutual benefit of my family; and I likewise will and devise in trust all my property, for the following purpose, that is to say, that, *at my wife's decease*, the whole of my property, of whatever nature or description, as well freehold as personal, shall be equally divided amongst my children, J., R., W., M., and C., their executors or assigns." One of these children was the heir-at-law. Lord Langdale, M. R., [without adverting to this fact, said "As to the property not engaged in the trade,] though the case as regards the real estate is not without difficulty, yet on the whole will, and what appears to me the evident intention, I think the widow is entitled to a life interest in both the real and personal estate." [It seems therefore that the M. R. did not intend to decide the general question; upon which, at all events since *Ralph v. Carrick*, it cannot be deemed an authority. Referring to this and other cases Sir C. Hall, V. C., said that in several of them the interest of "the widow was *more or less* connected with the carrying on of a business and supporting a family, which seemed to have been *a sort of* indication as to how the property was to be enjoyed during her life."](*l*)

Where, however, there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided, by having recourse to what may, for convenience of distinction, be called the distributive con-

Distinction where there is an express anterior devise of part to the person on whose death devise is to take effect.

(*k*) 1 Kee. 176.

[(*l*) 5 Ch. D. 995. The V. C. gave a very similar explanation of *Cockshott v. Cockshott*, 2 Coll. 432, where the widow was held to take a life estate by implication in estates upon which in a certain event a life annuity in her favor was

expressly charged by the will: and this, by virtue of a clause postponing "possession" by express devisees until the wife's death. But as to a similar clause added by codicil, see *Barnett v. Barnett*, 29 Beav. 239.]

struction, by which the words *after the death* are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first instance on account of the improbability that a testator should intend a person, to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, *devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise.

Thus, in *Cook v. Gerrard*, (m) where the testator Sir R. Kempe, being seized of demesne lands in fee, and also of the reversion of other lands expectant on the death of A, ^{Cook v. Gerrard.} directed that his wife should have the demesne lands for one year after his death; and then, after stating that he was desirous to continue the capital messuage in the name and blood of the Kempes, he devised the demesnes and the reversion to B, *habendum* immediately from the expiration of one year next after his decease, and the decease of A, for the life of B, he doing no waste. The testator further directed that B should, after the death of A, pay three annuities of £20 each by half-yearly payments. The testator died, and the year expired. It was contended that, in order to effect the intention of the testator, the words must be taken distributively: First, because if the lands descended to the testator's daughter and heir, she might change her name by marriage, and then his intention that the demesne lands should remain in the name of the Kempes would be defeated. Secondly, if A died within the year after the testator, the annuities given by the will could not be paid, unless B took the land immediately after the death of A, notwithstanding the year was not expired. (n) And, thirdly, if the demesne lands should descend to the heir in the meantime, until the death of A, then he might commit what waste he pleased, and there would be no means to prevent it, which would be directly against the true meaning of the testator. The Court of K.

(m) 1 Saund. 183, [cited 9 B. & Cr. 225.] both were postponed for the life of A, then both would be postponed for the

(n) This argument supposes, that if year.

B. held, that the words of the will should be taken distributively, and that B had good title to the demesne lands after the expiration of the year, and before the death of A.

So, in *Simpson v. Hornsby*, (o) where a testator devised to his wife for life all his lands in J., *and after the death of his wife*, he devised all his lands in J., *and certain other lands, and all other his real estate whatsoever*, to his daughter B. and the heirs of her body, with remainder to his daughter J. for life, with remainder to his first and other sons in tail. Lord Cowper was of opinion that the wife took nothing by implication, and that she was *entitled to a life estate in only those lands which were expressly devised to her; and that the rest of the real estate was intended to pass by the will immediately to B.

Again, in *Doe d. Annandale v. Brazier*, (p) where the testator gave to B. the rents of a messuage situate in A., for his life, *and after the decease of the said B.*, he gave the same rents, *together with* the rents of all his other houses and lands in A. aforesaid, unto certain persons for their lives and the life of the survivor, with remainder over. The question was, whether these devisees were entitled to the *other* lands at A. immediately on the testator's decease, or not until after the death of B.; and it was decided, that the words "from and after the decease of the said B." were to be confined to the lands devised to B. for his life, and did not postpone the interest of the devisees in question in the rest until that period. (q)

A different construction, however, prevailed in *Aspinall v. Petvin*, (r) where a testator devised his real estate to trustees, in trust to pay one moiety of the rents to his wife E. for life, and

(o) 1 Pre. Ch. 439, 452, 2 Vern. 723; stated from R. L., 9 B. & Cr. 228; see also *Boon v. Cornforth*, 2 Ves. 276, where, however, the construction was aided by the context.

(p) 5 B. & Ald. 64.

[(q) See also *Dyer v. Dyer*, 1 Mer. 414; *Drew v. Killick*, 1 De G. & S. 266, (where the words of the will seemed to point to the distributive construction); *Simmons v. Rudall*, 1 Sim. (N. S.) 115, (devise in fee with executory gift over to strangers of that "together with" the residue.)]

(r) 1 S. & St. 544. It was ingeniously

argued that, as J. was heir, as well to the testator as to W., in the event on which the estate was given to him, namely, the death of W. without issue, it came within the principle of the case of an estate given to the heir after the death of the widow; but the answer to this is, that in those events, the vacant interest did not *necessarily* devolve upon J., as W. in his lifetime might have devised or otherwise aliened it; and, consequently, the argument founded on the absurdity of his taking both did not apply; [but see *Doe d. Driver v. Bowling*, 5 B. & Ald. 722.]

the other moiety to his son W. (who was his heir-at-law), *and after the death of his said wife*, upon trust to convey the said hereditaments unto W. in fee; but if he died without issue in the lifetime of the wife, then, upon trust, *after the death of the wife*, to convey the same to testator's nephew J. in fee. W. died without issue in the lifetime of the wife; and the question was, whether J. was entitled immediately to the moiety of the rents not expressly devised to the wife, and, if not, whether she did not take it by implication. (s) Sir J. Leach, V. C., after very clearly laying down the general rule as before stated, considered this to be the common case of a devise to a stranger after the death of A.; and that, accordingly, no estate was raised in E. by implication, but the moiety in question for her life descended to the testator's heir-at-law.

*It is remarkable that the point suggested by the class of cases under consideration was not presented to the view of the court in this case, namely, that the words referring to the death of the wife applied exclusively to the moiety before devised to her, and did not prevent J. from taking the other moiety immediately; but, perhaps the frame of the will scarcely admitted of such a construction. The words "after the death of my wife" had been just before used in reference to both moieties in the devise to the son, and the terms of the *executory trust* seemed to import that no conveyance was to be made to J. until the death of the wife. This decision, therefore, appears not to clash with the preceding cases, which might seem to have established the distributive construction as the ordinary rule; but we are taught not so to consider them by a decision, in which all the cases in favor of this construction were treated as standing on special grounds, and as constituting an exception to the general rule.

Remarks on
Aspinall v.
Petvin.

Distributive
construction
not the gen-
eral rule.

The case here alluded to is *King v. Inhabitants of Ringstead*, (t) where a testator devised to the widow of his late son T. M. part of a messuage, to hold to her and her assigns for the term of her natural life, if she should so long continue a widow; *and from and after her decease, or day of marriage*, he gave the same and *other real property therein mentioned*, unto the four children of his late son T. M., deceased, their heirs and assigns forever. It was contended, on the authority

(s) No arguments appear to have been advanced in favor of the hypothesis, that if the widow did not take, it descended to the heir. (t) 9 B. & Cr. 218.

of the preceding cases, that the words were to be construed distributively, and, consequently, that the children took an immediate estate in possession in the property not devised to the wife; but the court, after taking an elaborate view of those cases, and showing that in each of them the intention of the testator, as collected from the context of the will, required such a construction, considered that they did not apply to the will under discussion, where the words must be construed in their ordinary grammatical sense. It was held, therefore, that, until the death or marriage of the son's widow, the estate not devised to her descended to the testator's heir-at-law.

It will be perceived that, as in this case the widow took no implied estate, (the express devise on her decease or marriage, not being to the heir of the testator,) the construction adopted by the court did not involve the difficulty of giving by implication to a person, in the lands not expressly devised to her, an estate corresponding to that which she derived in the lands so devised, in opposition to the maxim, *expressio unius est exclusio alterius*. Had it been attended with this result, the conclusion of the court might have been different. Possibly the distributive construction will, in future, be (as it ought originally to have been) restricted to such cases; but, considering how extremely slight is the difference of language in the will which was the subject of adjudication in *King v. Ringstead*, and in some of the preceding cases, particularly *Simpson v. Hornsby*, it must be confessed that *King v. Ringstead* does not place the doctrine on such a footing as to exclude future controversy.

[The suggestion that the distributive construction will be restricted to cases where the postponed devise is to the heir-at-law finds support in *Attwater v. Attwater*, (u) where a testator gave to his cousins A and B his freehold house and premises, for their use during the life of each; and at the decease of both gave the same to C, a son of his niece, to be retained in the family forever, together with his copyhold and leasehold property at N. C., was not the testator's heir-at-law or next of kin, and Sir J. Romilly, M. R., said that although there was considerable conflict between the authorities, he considered that the case was governed by the rule laid down and settled by *King v. Ringstead*; that C therefore took nothing in the

Remarks upon
King v. Ring-
stead.

King v. Ring-
stead followed.

[(u) 18 Beav. 330. See also *Davenport v. Coltman*, 9 M. & W. 481, 12 Sim. 588, where, however, the distributive construction was not suggested, and the income during the wife's life was not claimed by the daughters. But see *Lill v. Lill*, 23 Beav. 446.

copyholds and leaseholds until after the decease of both A and B, and that the customary heir (who was also sole next of kin) took the intermediate interest.]

The position that a devise to the heir after the death of A creates in A an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir-apparent or heir-presumptive after the death of his wife, and in the same will devises the residue of his real estate to A, (a stranger,) since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life. (x)

Effect of residuary devise in excluding the implication arising from devise to heir.

Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the residuary devisee, to take effect in possession on the decease of another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A, to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and, therefore, in the case supposed, A would, undoubtedly, have an estate for life by implication.

Application of doctrine to residuary devises.

[It was decided in one case, that a devise by a testator, "in case his wife should be *enceinte* with one or more children at the time of his death, to such child or children," implied a gift to any children born after the date of the will though before the testator's death, on the ground that it was impossible to suppose the father would provide for a posthumous child, leaving children *in esse* unprovided for. (y) But in *Doe d. Blakiston v. Haslewood*, (z) the Court of C. P. unanimously overruled that decision. thinking that in such a case the testator never contem-

Whether a gift to all after-born children implied in a gift to posthumous children.

(x) Per Kindersley, V. C., *Stevens v. Hale*, 2 Dr. & Sm. 28, acc.

(y) *White v. Barber*, 5 Burr. 2703.

(z) 10 C. B. 544.

plated the birth of children in his lifetime, and never *intended* to provide for them by his will: the will was made in contemplation of a particular combination of circumstances, which not having happened, the will failed. However, in a subsequent case, (*a*) *Blackburne* (L. C. Ir.), though not called upon to decide the point, expressed a preference for the elder authority.]

As a devise to a stranger after the death of A creates no estate in A by implication in the meantime, it might seem to follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context. A testator (*b*) devised land at T. to trustees, in trust to receive the rents and profits during the lives of his four daughters and the survivor of them; and “*afterwards* to pay such rents and profits to and *among such *survivor*, and the child or children of such my daughters who shall first happen to die; and from and immediately after the decease of my said four daughters, my will is, that they do sell the premises, and pay the moneys arising therefrom, in four equal parts,” to the children of his daughters. By a subsequent clause, he bequeathed his chattels among his children, except his daughter H., who was only to receive in full satisfaction of what was before bequeathed to her, three shillings a week during her life, or “until her distributory share was exhausted,” out of his estate at T. and personal effects, for her separate use. The court was clearly of opinion that the testator never intended to leave all his daughters without any provision until three of them were dead; and with reference to the subsequent clause, which showed that his daughter H. was in his opinion entitled for life, they held all the daughters to take.

Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives only of several co-devisees or co-legatees, with a gift over on the decease of the survivor, thus leaving unpro-

(*a*) In *re Lindsay*, 5 Irish Jurist 97; arising from the whole will was held to see also *Alleyne v. Alleyne*, 2 Jo. & Lat. 558; *Goodfellow v. Goodfellow*, 18 Beav. 356.] of a direct gift, see *Brown v. De Laet*, 4 B. C. C. 527; *Crowder v. Clowes*, 2 Ves., Jr., 449; *Wainwright v. Wainwright*, 3 Ves. 558.

(*b*) *Saunders v. Lowe*, 2 W. Bl. 1014. For other cases in which the implication

vided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survivor. In several such cases, (c) the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

In *Townley v. Bolton*, (d) the bequest was in these words: "I give to my sister M. T. and her husband G. S. T. £50 per annum long annuities *for their joint lives*, and *after their decease*, to go to my own nephew, C. P." Sir J. Leach, M. R., held, that the gift over being after the decease of the husband and wife, it was plain that the testator intended that the survivor should be entitled.

Here, too, it is doubtful whether the survivor became entitled *by the effect of the implication of a gift in remainder for life, expectant on the determination of the joint lives, or as surviving joint tenant for life, the words "for their joint lives" (which otherwise, would have determined the interest of both on the death of either) (e) being rejected. The latter appears to have been the ground taken in the arguments at the bar.

In *Jones v. Randall*, (f) a testator bequeathed an annuity, upon trust for A for life, and after her death to pay and divide the same amongst the children of A who should happen to survive her, in equal shares if more than one child, and if but one child, then to such only child; such annuity to be paid during the lives of such children, *and the life of the survivor of them*. It was contended that the survivors were entitled by implication; but Sir T. Plumer, M. R., held that the argument, that because the annuity was for the life of the survivors, therefore the survivors were to take, amounted only to conjecture; [that the words in question only

Annuity to several for lives of them and survivor.

(c) *Tuckerman v. Jefferies*, 3 Bac. Abr. 681, Gwillim's ed. 81; *Armstrong v. Eldridge*, 3 B. C. C. 215; *Pearce v. Edmeades*, 3 Y. & C. 246; all stated *post* ch. XXXII.; [*Cranswick v. Pearson*, 31 Beav. 624. But see *In re Drakeley's Estate*, 19 Beav. 395; *Stevens v. Pyle*, 28 Beav. 388; and other cases cited ch.

XXXII.]

(d) 1 My. & K. 148; [see also *McDermott v. Wallace*, 5 Beav. 142; *Moffatt v. Burnie*, 23 L. J., Ch. 591; *Day v. Day*, Kay 703.

(e) *Grant v. Winbolt*, 23 L. J., Ch. 232; but see *Smith v. Oakes*, 14 Sim. 122.]

(f) 1 J. & W. 100.

described how long the annuity was to last; they determined the subject-matter of the bequest, regulating the duration, but not the persons to participate in it: and] the children took as tenants in common an annuity for their lives and for the life of the survivor.

[So in *Bryan v. Twig*, (g) a bequest of an annuity to the children of J. B. equally share and share alike, for and during the term of their joint natural lives or the life of the survivor of them, was held by Sir J. Rolt, L. J., to make the children tenants in common of an annuity which was to endure until the death of the survivor; so that on the death of one his share went to his representatives. With reference to *Armstrong v. Eldridge* and similar cases, (h) he said that where the duration of the annuity was not clearly defined a gift over on the death of the survivor was material, but was immaterial where the duration of the annuity had already been distinctly marked out as extending till the death of the survivor: and that it was important to observe that in none of those cases were the representatives of the deceased annuitants parties to the suit.

Where, too, there is a gift to A, B and C for their lives, and after the decease of A, B and C, to their children, a gift of the whole to the survivors or survivor for his or their lives must not be too readily inferred, the court, in favor of the children, being *generally inclined to lay hold of slight indications of an intention to give the share of each, on his death, to his children.] (i)

The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate, including terms for years; ^{2.} for though the terms in which the doctrine is [frequently stated as regards real estates,] namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate, [yet it is equally true that the next of kin is not to be displaced by conjecture.] (k)

In an early case, (l) it was held by three justices, that if a man gave

(g) L. R., 3 Ch. 183. See also L. R., C. 246; and other cases noticed *post* ch. 3 Eq. 433 (Similar bequest in the same XXX., § 5.)
will); *Eales v. Earl of Cardigan*, 9 Sim. 384. 5. See, however, *White v. Green*, 1 Ired. Eq. 45.

(h) *Vide ante* n. (c)

[(k) 3 Ves. 493; *ante* p. *356.]

[(i) *Hawkins v. Hammerton*, 16 Sim. 410; *Doe d. Patrick v. Royle*, 13 Q. B. 100; but see *Pearce v. Edmeades*, 3 Y. & 214, Dev. (Pa.), pl. 3; see also *Rayman v.*

a term to his son after the death of the wife of the testator, this shall not raise any estate in the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the testator without any devise, but the executor.

But in *Doe d. Bendale v. Summerset*, (*m*) where A. possessed of a term of ninety-nine years, determinable on the lives of his daughter B. and J. S., bequeathed the premises to his daughter M. after the death of his daughter B., during the life of J. S.; Willes and Blackstone, JJ., held that B. took an estate for life by implication. A strong probable implication was, they said, sufficient: it need not be a necessary implication. Willes, J., it is said, spoke slightly of the case in *Moore*; and Blackstone, J., still more slightly of the case in *Croke*, which, he observed, was not determined, but was only upon a collateral point.

If *Doe v. Summerset* is to be considered as identified with a proposition that the bequest of a term of years to B after the death of A gives a life interest to A by implication, it is as difficult to reconcile it with *Horton v. Horton* as with sound principle, [and must be considered as overruled by *Ralph v. Carrick*, (*n*) which shows that] the analogy between a devise of *real estate to the heir [and a gift of personal estate to the next of kin] after the death of A, [is complete; and that unless] the legatee of the future interest is the sole person entitled in the character of next of kin, residuary legatee, or executor [at the date of the will], to the intermediate interest, not specifically disposed of, [A will not take a life interest by implication.

Observations
upon *Doe v.*
Summerset.

Cases decided in the interval between *Doe v. Summerset* and *Ralph v. Carrick*, during which there was] an inclination to construe generally a bequest of personalty at the death of A to give to A a prior life interest by implication, [must be carefully examined before they are accepted as authorities

Tendency to
imply life inter-
est in personal
bequests,
checked by
Ralph v. Car-
rick.

Gold, *Moore* 635, (where, however, the point did not arise, as the wife, at whose death the property was devised, was appointed executrix, and became entitled *quacunque via*.)

(*m*) 5 Burr. 2608.

[(*n*) 5 Ch. D. 984, 40 L. T. (N. S.) 505. This decision overrules *Humphreys v. Humphreys*, L. R., 4 Eq. 475, and renders it unnecessary to refer in detail to cases

where special grounds were relied on to repel the implication, *e. g.* *Stevens v. Hale*, 2 Dr. & Sm. 22' (A otherwise provided for); *Isaacson v. Van Goor*, 42 L. J., Ch. 193 (express life estate to A in certain events); *Cranley v. Dixon*, 23 Beav. 512 (partial intestacy—often deemed strong ground for raising the implication—obviated by residuary bequest); *Henderson v. Constable*, 5 Beav. 297

upon the question, what kind of context will furnish sufficient special grounds for raising the implication in cases where the legatee of the future interest is not the sole person entitled as above mentioned. The implication was raised] in one instance where there was an express gift to the same legatee determinable during her life. Thus, in *Bird v. Hunsdon*, (o) where a testator directed, after payment of debts and legacies, the residue of his money to be put into government security, and the interest to be paid to bring up and educate M., adding, "the said M. to have the interest so long as she continues single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children, all share alike." M. married and had a child; nevertheless, she was held to be entitled to the income during the remainder of her life. Sir T. Plumer, M. R., observed, that the testator contemplated three periods: "First, he gives the interest for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favored object, and the capital not given over till the death of that person, the court is driven to the necessity of saying, either that there is intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative."

[This case bears some resemblance to those cited in the next section, where a gift to A during minority has been enlarged to *an absolute fee in A on his attaining twenty-one, by virtue of a gift over in case of his death under that age.]

III.—Hitherto the doctrine of implication has been viewed chiefly

Implication from express gift on death combined with some contingency.

in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the

(gift under a power—interest during life of A held to go as in default of appointment.)

(o) 2 Sw. 342; see also *Blackwell v. Bull*, 1 Kee. 176, *ante* p. *535; [*Cock v. Cock*, 21 W. R. 807, is but shortly reported; *Davies v. Hopkins*, 2 Beav. 276,

may perhaps be referred to another ground, *post* ch. XXII., § 6, n. In re *Betty Smith's Trusts*, L. R., 1 Eq. 79, and perhaps In re *Blake's Trust*, L. R., 3 Eq. 799, are not properly cases of implication, but of express gifts upon apparent (not real) contingencies.]

express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise to B in the event of A dying under age; in which case, as there is no devise to A in the alternative event of his attaining his majority, the question arises, whether he can take the fee (*p*) by implication in such event. If B were the testator's heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A's decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A dying under age, supplies no more valid ground for holding A to take an estate in fee by implication, than is afforded for the implication of an estate for life to a person on whose decease the lands are devised to a stranger: for a testator *may* intend the fee to descend to the heir on the alternative contingency of A attaining his majority. And, perhaps, the authorities rightly considered, do not militate against this hypothesis; for, though an estate in fee was held, in one instance, to arise by implication, under such a devise, to a person who was not the testator's heir, yet the construction was founded on reasoning partly derived from the context.⁶

(*p*) Why, it may be asked, a fee? On this point *vide* *Purefoy v. Rogers*, 2 Saund. 388, and other cases discussed ch. XXXIII, § 3.

6. For implication of a fee simple from power of disposal, charge of legacy, &c., see ch. XXXIII, *infra*. As to implication of absolute interests Mr. Theobald says, in his treatise on wills, (p. 415, *et seq.*): "If there is a gift to A till twenty-one, with a gift over if he dies under twenty-one, A will take by implication the fee, or an absolute interest in personalty, defeasible upon death under twenty-one. *Tomkins v. Tomkins*, cited 1 Burr. 234; *Paylor v. Pegg*, 24 B. 105; *Gardiner v. Stevens*, 30 L. J., Ch. 199; *In re Harrison's Estate*, 5 Ch. 408. The argument in favor of implication is strengthened if the residuary devisees are different from those who would take under the gift over, so that without implication the property would go to different persons, according as A died under, or over

twenty-one. *Cropton v. Davies*, L. R., 4 Ex. 159. And even in the absence of a gift over, if there is anything to show that A was intended to take after twenty-one, this intention will be carried out. *Wilks v. Williams*, 2 J. & H. 125; *Tunaley v. Roch*, 3 Dr. 720; *Atkinson v. Paice*, 1 B. C. C. 91; *Newland v. Shephard*, 2 P. Wms. 194; *Peat v. Powell*, Ambl. 387, 1 Ed. 479; these latter cases have, however, been disapproved of by Lord Hardwicke in *Fonnereau v. Fonnereau*, 3 Atk. 315; but they may probably be supported on the language of the will in each case. But the implication will be rebutted if there are circumstances tending to show that the person to take till twenty-one is not to take an absolute interest if he survives twenty-one; if, for instance, the gift is to the wife for her and her son's support till the son attains twenty-one, and if he dies under twenty-one, to the wife for life and then over. In this case the son did not take the whole interest

Thus, in *Goodright d. Hoskins v. Hoskins*, (q) a testator bequeathed unto his son Richard certain leasehold premises called S., to hold the same unto his said son Richard until his (R.'s) son Thomas should attain the age of twenty-one years, and no longer; but in case his said son Thomas should die in his minority, then the testator gave the said leasehold premises unto John and Richard, sons of the said Richard, or either of them, attaining the age of twenty-one years as aforesaid; and he desired that his premises at S. might be quitted and delivered up as aforesaid by his said son Richard; and the testator, in a certain event, revoked, *but otherwise confirmed, the said bequest of S. and the other legacies given to his

till twenty-one, and it could therefore hardly be implied that he was to take the whole after that age to the exclusion of his mother. *Fitzhenry v. Bonner*, 2 Dr. 36. No implication in favor of children arises upon an absolute gift of personalty to A, and if he dies without children over, or upon a gift to several as tenants in common, and if any die without issue, their shares to those then living or their children. *Addison v. Busk*, 14 B. 459, 2 D., M. & G. 810; *Cooper v. Pitcher*, 4 Ha. 485, 16 L. J., Ch. 24; *Dowling v. Dowling*, L. R., 1 Eq. 442, Id., 1 Ch. 612. Nor does any implication in favor of children arise, if the gift is to A for life, and if he dies without children over. *Green v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 B. 200; *Sparks v. Restall*, 24 B. 218; *Neighbor v. Thurlow*, 28 B. 33; *In re Hayton's Trusts*, 4 N. R. 54. But in this latter case, though the mere gift over in default of children will not be sufficient to give the children any interest by implication, the court will, it seems, lay hold of any indication of intention to fortify the argument based upon the gift over, so as to give the children an interest. In the former case, where the absolute interest is given to the first takers, the 'mere fact of a testator giving over property in case there are no children does not furnish any presumption on which this court can act in favor of his giving it to the children, if there are

any, as against their parents.' *Dowling v. Dowling*, L. R., 1 Ch. 615. But where the parent takes only a life interest the children can take nothing from him, and at the same time the presumption against intestacy arises. It seems *Ex parte Rogers*, 2 Mad. 449, may be supported on this ground; see, too, *Kinsella v. Caffray*, 11 Ir. Ch. 154, where the gift over was not merely on death without issue, but upon such death, or upon death leaving issue, and such issue dying under twenty-one. Apparently, where there is a gift to A to dispose of among a certain class by deed or will, a life interest would be implied in A. *Acheson v. Fair*, 3 D. & W. 527. See *Williams v. Roberts*, 27 L. J., Ch. 177, 4 Jur. (N. S.) 18. When there is a gift to A for life, remainder to such of her children as she may appoint, the power is looked upon as a trust, and if the parent does not appoint, the property goes to the children equally. *Brown v. Higgs*, 8 Ves. 574; *Butler v. Gray*, 5 Ch. 26; *Kellet v. Kellet*, I. R., 5 Eq. 298. This does not apply if there is a gift over in default of appointment. *Pattison v. Pattison*, 19 B. 638; *Roddy v. Fitzgerald*, 6 H. L. 823; and see *In re Jeffery's Trusts*, 14 Eq. 136; nor where the power is to be exercised only in events which never happen. *Halfhead v. Shepherd*, 28 L. J., Q. B. 248, 5 Jur. (N. S.) 1162." (q) 9 East 306.

son Richard's family. Thomas attained twenty-one, and was held to be entitled: Lord Ellenborough relying much upon the direction that the premises should be *quitted and delivered up as aforesaid* by the testator's son Richard, that is, when Richard's son Thomas came of age, to Thomas; "for to whom else" (said his lordship) "could Richard deliver up the possession in that event?"

But might not these words (which merely imported *by whom* the premises were to be delivered up) have been satisfied by their delivery up to *any* person entitled under or *dehors* the will? Unless Thomas were to become entitled at twenty-one, the limitation over, in case he died under that age, was certainly very absurd, and the case may be considered as somewhat analogous in principle to those in which a devise has been enlarged to a fee by such a devise over. (r)

This case was much relied on in *Davis v. Davis*, (s) in support of the argument for raising an implied gift to the testator's daughter, from the following words: "It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs; and I appoint him guardian to my daughter." Sir J. Leach, M. R., decided in favor of the implication. He said, that it was plain it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs; and, from his appointment as guardian to the daughter, it was to be implied that the arrangement and settlement was to be for her benefit; but Lord Brougham reversed this decree, conceiving that there was nothing in the language or provisions of the will from which a bequest to the daughter could be safely and reasonably implied. He observed, that *Newland v. Shephard* (t) and *Goodright v. Hoskins*, (the former of which had been often questioned, (u) and the latter had

Remark upon
Goodright v.
Hoskins.

Davis v. Davis.

(r) *Vide* ch. XXXIII., § 3

(s) 1 R. & My. 645.

(t) 2 P. W. 194. In this case, (which is often cited,) a testator gave the residue of his real and personal estate to trustees, upon trust, to apply the income for the maintenance of his grandchildren during minority, but went no further. Lord Maclesfield—"The intention is most plain, that the grandchildren should have the surplus, both of the real and personal estate, after their age of twenty-one." [In

Atkinson v. Paice, 1 B. C. C. 91, a bequest in trust for R. L. until he should come of age, was held to be an absolute gift to R. L.; and in *Peat v. Powell*, Amb. 387, 1 Ed. 479, a devise and bequest in nearly the same words received the same construction. See further ch. XXXIII., § 3, *ad fin.*; *Tunaley v. Roch*, 3 Drew. 720.

(u) 3 Atk. 316. "I say nothing as to whether it was rightly decided," per Wood, V. C., 2 J. & H. 128.

been rested by Lord Ellenborough on special grounds,) fell far short of this.

*[The analogy suggested above is closer where there is in the first place an estate devised to be enlarged. Thus in *Cropton v. Davies*, (x) where a testator devised three houses to trustees upon trust, as to the first, for his daughter A, her heirs and assigns; as to the second, for his daughter B, her heirs and assigns; and, as to the third, to apply the rents for the advancement and benefit of his granddaughter C until she attained twenty-one, but, in case she should die under that age, then he devised the same to A and B and their heirs as tenants in common: all the residue of his real and personal estate he devised to X, Y and Z. C attained twenty-one, and the Court of C. P., without saying that the devise alone would have raised a fee by implication, thought that, looking to it and to the other provisions together, the intention was clear to give C the whole interest in the third house, to go over to A and B only in an event which had not happened. If this were not so, the strange consequence would follow that if C died under twenty-one the house would go over to A and B, whereas if she attained twenty-one it would go over to the residuary legatees, who were other persons. Such an intent the court thought could not be presumed from the structure and language of the will.

In *Tomkins v. Tomkins* (y) there was nothing but a bare devise "to his brother in trust for his eldest son B till he should attain twenty-one, and, if he should die before twenty-one, then a devise over;" yet it was held that on attaining twenty-one B took the whole by implication. So, in *Gardiner v. Stevens*, (z) where leaseholds were bequeathed "in trust for A and B till B is twenty-five years old, and in case they, A and B, should die before B attains twenty-five," then over, it was held by Wood, V. C., that, on B attaining twenty-five, A and B became absolutely entitled in equal moieties. And in *Wilks v. Williams* (a) the same judge treated it as clear that upon a devise or bequest of real or personal estate, upon trust for the child or children of any person until they attain twenty-one, followed by a gift over to a third person in case the children do not live to attain twenty-one, the children, if they live to attain twenty-one, take absolutely. The

[(x) L. R., 4 C. P. 159.

(z) 30 L. J., Ch. 199.

(y) As cited by Lord Mansfield, 1 Burr. 234.

(a) 2 J. & H. 125.

case itself went somewhat further. The testatrix desired her trustees to invest the residue, and gave the interest to A and B equally, and at their decease the dividends were "to be con*tinued to their children till they come to the age of twenty-one." There was no gift over, but the testatrix added, "I constitute and appoint C and D trustees for the said A and B and their children." The children were held to take absolutely on attaining twenty-one; for the trust during minority was complete without the last clause, which therefore must be looked upon as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue.

But, of course, the children will not take an absolute interest by implication if in the same event there is an express gift to them of a less interest. (b) And it has been held that When this implication fails. the event upon which the gift over is to take effect must exactly correspond with that upon which the limited trust is to cease. If the gift over depends on a further collateral event, as on death under twenty-one and unmarried, the implication does not arise. (c) And where (d) the trust during minority was for the minor *and his mother*, with a gift over to her if he died under twenty-one, Sir R. Kindersley, V. C., held that there was not enough to show that the minor, if he attained twenty-one, was to be benefited exclusively of his mother.]

IV.—Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he No implication that equitable is to be co-extensive with legal disposition. intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other.

As in *Stubbs v. Sargon*, (e) where a testatrix devised to trustees and their heirs her copyhold dwelling-house, (wherein she principally resided,) garden and ground, *together with the furniture and effects therein*, and the coach house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, &c., and

(b) *Savage v. Tyers*, L. R., 7 Ch. 356.

(c) *Ib.*

(d) *Fitzhenry v. Bonner*, 2 Drew. 36.]

(e) 2 Kee. 255, 3 My. & Cr. 507; compare this case with *Ackers v. Phipps*, 9 Bli.

431, 3 Cl. & Fin. 665.

the *heirs* or assigns of the survivor, should pay the rents of the said *hereditaments* to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said *hereditaments* during her life, to the intent that the same *hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the *heirs* or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said hereditaments and premises; (f) and the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause. (g) Lord Langdale, M. R., held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the same opinion, observing, that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

So, in *Jackson v. Noble*, (h) where a testator gave certain freehold, *copyhold*, and leasehold estates (particularly describing them) and £1000 stock, to trustees, their heirs, executors, administrators and assigns, to hold the last-mentioned *freehold and leasehold* estates, and stock, unto the trustees, their heirs, executors, administrators and assigns, in trust for his daughter A for life, for her separate use; and after her decease, upon trust, to convey and assign the several last-mentioned freehold and leasehold estates and £1000 stock unto the heirs, executors, administrators and assigns of A. And the testator empowered his daughter to grant leases of the freehold and leasehold estates so given to her. Lord Langdale held, that as the testator had omitted all mention of the copyhold estates

(f) The addition of the word "premises," in this instance, afforded ground for extending the ultimate trust, unless restricted by the preceding trusts to the furniture; but as the proceeds under this

trust were to form part of the residuary personal estate, the point was immaterial.

(g) This fact is to be assumed, but is not stated in the report.

(h) 2 Kee. 590.

after the devise to the trustees, he could not consider them as comprised in the trust.

V.—Implied gifts may be and often are created by powers of selection or distribution in favor of a defined class of objects ;
 *for, where property is given [or appointed under a general power] (*i*) to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied ; the presumption being, that the testator could not have intended the objects of the power to be disappointed of his bounty, by the neglect of the donee to exercise such power in their favor. (*k*)

Gifts implied from powers of selection and distribution.

A leading authority for this construction is the case of *Brown v. Higgs*, (*l*) where the bequest was, “to such children of my nephew S., as my nephew I. shall think most deserving, and that will make the best use of it, or to the children of my nephew W., if any such there are, or shall be.” I. died in the lifetime of the testator. Sir R. P. Arden, M. R., and subsequently Lord Eldon, after great consideration, held the children to be entitled under the implied trust : [and this decision was affirmed in D. P.]

And the implication, it seems, is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him ; (*m*) which event, it is to be

Implied gift in one, not precluded by express gift in another, event.

[*i*] *White v. Wilson*, 1 Drew. 298.

[*k*] The early cases of *Crossling v. Crossling*, 2 Cox 396, and *Duke of Marlborough v. Godolphin*, 2 Ves. 61, which are opposed to this construction, would probably be decided differently at the present day ; see Sugd. Pow. (8th ed.) 592.]

[*l*] 4 Ves. 708, 5 Ves. 495, 8 Ves. 561 ; see also *Harding v. Glyn*, 1 Atk. 469 ; *Cruwys v. Colman*, 9 Ves. 319 ; *Forbes v. Ball*, 3 Mer. 437 ; [*Witts v. Boddington*, 3 B. C. C. 95 ;] *Walsh v. Wallinger*, 2 R. & My. 78 ; [*Grieveson v. Kirsopp*, 2 Kee. 653 ; *Jones v. Torin*, 6 Sim. 255 (as to which see *ante* p. *517, n. (*x*)) ; *Martin v. Swannell*, 2 Beav. 249 ; *Fenwick v. Greenwell*, 10 Id. 412 ; *Fordyce v. Bridges*, 10 Beav. 90, 2 Phil. 497 ; *Burrough v. Phil-*

cox, 5 My. & Cr. 73 ; *Falkner v. Lord Wynford*, 15 L. J., Ch. 8, 9 Jur. 1006 ; *Penny v. Turner*, 15 Sim. 368, 2 Phil. 493 ; *Alloway v. Alloway*, 4 D. & War. 380 ; *Salisbury v. Denton*, 3 K. & J. 535 ; *Joel v. Mills*, Id. 474 ; *Reid v. Reid*, 25 Beav. 469 ; *Izod v. Izod*, 32 Beav. 242 ; *In re Caplin's Will*, 2 Dr. & Sm. 527. As to the sufficiency of precatory words to create a power from which a gift may thus be implied, see *Bernard v. Minshull*, Johns. 292. No gift can be implied where the donee has a discretion whether he will appoint anything or not, *In re Eddowes*, 1 Dr. & Sm. 395. Compare *Brook v. Brook*, 3 Sm. & Gif. 280.

[*m*] *Kennedy v. Kingston*, 2 J. & W. 431.

observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

An express gift over in default of appointment, in favor of either the objects of the power or any other person, of course precludes all implication. (n) [But a gift over in default of objects of the power strengthens the implication in their favor. (o)]

Implication
precluded by
express gift in
same event.

And there is, it seems, no necessary inference that the testator *intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift expressly limited in default of appointment to a class of objects identical in other respects with that of the power. Thus, where (p) the devise was to A for life, with remainder to such child and children of A and *him surviving*, who should be educated as a member of the Church of England, in such parts and proportions, &c., as A should appoint, and, in default of such appointment, to the first son of A who should be educated as aforesaid and the heirs of the body of such son, with divers remainders over: it was contended that as the power of appointment was restricted to "surviving" children, the gift over was to be construed with a like limitation; but Sir J. Leach, M. R., held, that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference.

A gift arising *by implication* from a power of selection or distribution, however, applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favor of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who of course could not have been made objects of an appointment by will. (q) [Conse-

Objects of
power and im-
plied gift must
be identical.

[(n) *Pattison v. Pattison*, 19 Beav. 638; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Goldring v. Inwood*, 3 Gif. 139. Compare *In re Jeffereys' Trusts*, L. R., 14 Eq. 136.

(o) *Butler v. Gray*, L. R., 5 Ch. 30.]

(p) *Smith v. Death*, 5 Mad. 371.

(q) *Walsh v. Wallinger*, 2 R. & My. 78; see also *Kennedy v. Kingston*, 2 J. & W. 431; [*Freeland v. Pearson*, L. R., 3 Eq. 658. In *Falkner v. Wynford*, 15 L. J., Ch. 8, 9 Jur. 1006, the power was to appoint by deed or will, and, consequently,

the gift by implication was not restricted to the objects living at the decease of the donee. An express gift in default of appointment applies to the same class of persons as a simple gift unconnected with any power, *Pattison v. Pattison*, 19 Beav. 638; *Richards v. Davies*, 13 C. B. (N. S.) 69, 861. And it is said that a gift to a class in such shares as A shall by will appoint is to be distinguished from a mere power for A to give among the class, and is for this purpose equivalent to an ex-

quently if all the objects die in the donee's lifetime, no gift at all can be implied. So, although the power be to appoint by deed or will, yet if upon the true construction of the instrument creating it the objects of it are required to be living at a deferred period, the implied gift in default will also be to those persons only. (*r*) Where the power is to appoint in favor of some one person to *be selected out of a class, if any gift could be implied in default of appointment, it ought to be to one person only of the class ; but as no gift can be implied to one more than another, it seems that none of the class can take by implication.] (*s*)

And it should seem, that a gift arising by implication from a power of selection or distribution in favor of *relations*, will apply exclusively to the relations living at the death of the donee, even though [they be not the donee's own relations, and though] the power is not in terms confined to an appointment by will. (*t*)

If the subject of the implied gift resulting from such a power be real estate of inheritance, the implication [confers] an estate in fee, even though the will be dated before 1838, if the power authorizes the limitation of estates in fee. (*u*)

Although a power of selection or distribution is usually preceded by the reservation of a life interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided, that where a testatrix, after bequeathing her property to her mother, requested her to leave £500 to each of her (the testatrix's) sister A's children, (and some legacies to other persons,) Life interest not implied in donee from power of distribution.

press gift in default, *Lambert v. Thwaites*, L. R., 2 Eq. 151; but in *Woodcock v. Renneck*, 1 Phil. 72, 4 Beav. 190, it was held by Lords Lyndhurst and Langdale that the question who were entitled under such a gift depended upon the construction of the whole clause, including the words importing power.

(*r*) *Halfhead v. Shepherd*, 28 L. J., Q. B. 248, 5 Jur. (N. S.) 1162; In re *White's Trust*, Johns. 656; In re *Phene's Trusts*, L. R., 5 Eq. 346; *Winn v. Fenwick*, 11 Beav. 438; *Stolworthy v. Sanicroft*, 33 L. J., Ch. 708, 10 Jur. (N. S.) 762. But it has been doubted whether the point of construction in the last two cases was

rightly decided, L. R., 2 Eq. 159, 160, 4 Ch. D. 68.

[(*s*) *Sugd. Pow.* (8th ed.) 593.]

(*t*) *Att.-Gen. v. Dooley*, 4 Vin. Abr., Ch. Us. C., pl. 16, p. 485; *Harding v. Glyn*, 1 Atk. 469, cited 5 Ves. 501. The case of *Pope v. Whitcombe*, as reported 3 Mer. 689, is *contra*, in regard to a power of distribution; but, as corrected from R. L., *Sugd. Pow.* (8th ed.) pp. 663, 953, is an authority on the same side. [And see *Finch v. Hollingsworth*, 21 Beav. 112.]

(*u*) *Bradley v. Cartwright*, L. R., 2 C. P. 511. And see *Casterton v. Sutherland*, 9 Ves. 445; *Crozier v. Crozier*, 3 D. & War. 383.]

and the remainder to her sister B, "to dispose of among her children as she may think proper," B herself took no interest. (x)

VI.—It remains to consider the implication of estates tail. Accord-

Implication of
estates tail,
before 1 Vict.,
c. 26.

ing to the doctrine which has been the subject of discussion in the second section, it is not to be doubted, that if lands were devised to the testator's heir apparent or heir presumptive in fee in case A should die without issue, (which, if the will were made before 1838, would import a *general* failure of issue,)(y) this would make A tenant in tail, with reversion in fee to the testator's heir—the event described being precisely that which would involve the extinction of an estate tail; and it being impossible to suppose that the testator could intend to make a *devise to take effect at a future period, to the very person who would in the absence of disposition take the property by act of law, without intending that it should in the meantime devolve to some other person. The reports, however, do not present exactly such a case.

It has been long settled, however, that a devise, in a will which is regulated by the old law, to a person and his heirs, or to a person indefinitely, with a limitation over in case he die without issue, confers an estate tail, on the ground, in the former case, that the testator has explained himself to have used the word "heirs" in the qualified and restricted sense of heirs of the body, (z) and in the latter case on the ground that he has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness.⁷ According to some early

Whether an ex-
press estate for
life can be en-
larged to an es-
tate tail by im-
plication.

(x) *Blakeney v. Blakeney*, 6 Sim. 52; [but see *Huddleston v. Gouldsbury*, 10 Beav. 547; *Ramsden v. Hassard*, 3 B. C. C. 236.]

(y) The implication doctrine discussed in the text assumes that the words referring to "death without issue" import an indefinite failure of issue. What force of context is requisite to explain them to be used in any other than this their ordi-

nary sense (which is a subject of much intricacy, from the accumulation of authorities,) will be considered ch. XLI.

[(z) For other cases where "heirs" has been so explained, see ch. XL., § 3.]

7. In limitations over on default of issue, now commonly made by statute to be a definite default on the death of the first taker, the rule observed is that if a definite default be intended by the testa-

cases, however, an express estate for life cannot be so enlarged into an estate tail by implication, on the ground that implication can only be admitted in the absence of, and never in contradiction to, an express limitation. But in *Bamfield v. Popham*, (a) (which is the authority usually adduced for this doctrine,) the conclusion at which the court arrived may be sustained upon other grounds; if not, it has been overruled by numerous decisions, (b) in which an estate tail has been raised in the first taker, by implication from words devising the prop-

tor, the limitation over will be that of an executory devise after a conditional fee—but if an indefinite failure of issue be intended, the limitation over will be by way of remainder after an estate tail in the first taker, *Hall v. Priest*, 6 Gray 18; *Den v. Allaire*, Spencer 6; *Fosdick v. Cornell*, 1 Johns. 440; *Blair v. Vanblarcum*, 71 Ill. 290; *Adams v. Chaplin*, 1 Hill Ch. (S. C.) 265. The law favors a remainder and gives effect to that construction in preference to the other where it is possible, *Fisk v. Keene*, 35 Me. 349; *Wall v. Maguire*, 24 Penna. St. 248. In the following cases the limitation has been construed to be an executory devise upon a qualified fee: 1st. Where the gift is to A in fee with a gift over “*if he die without issue*,” *Hall v. Chaffee*, 14 N. H. 215; *Wilkes v. Lion*, 2 Cow. 333; *Sale v. Crutchfield*, 8 Bush 632; *Riehle’s Appeal*, 54 Penna. St. 97. 2d. Where the gift is to A and B, and “*if either die without issue*” to the “*survivor*,” *Seddell v. Wills*, Spencer 223; *Howell v. Howell*, Id. 411; *Waldron v. Gianini*, 6 Hill (N. Y.) 601; *Pelletreau v. Jackson*, 11 Wend. 123; *Anderson v. Jackson*, 16 Johns. 382; *Fosdick v. Cornell*, 1 Johns. 440; *Lion v. Burtis*, 20 Johns. 483; *Caldwell v. Skilton*, 13 Penna. St. 152; *Sheet’s Appeal*, 52 Penna. St. 257. 3d. Where the gift is to A *for life*, and “*if he die without issue*,” over, no estate tail will be implied, although the limitation over is construed to be a remainder, *Curtis v. Longstreth*, 44 Penna. St. 297; *Walker v. Milligan*, 45 Penna. St. 178. So, *Low v. Harmony*, 72 N. Y. 408, 410, notwithstanding power of disposal in such event.

The following are cases of estate tail raised by implication: 1st. To A and his heirs with a gift over “*if he die without issue*,” *Albee v. Carpenter*, 12 Cush. 382; *Wynn v. Story*, 38 Penna. St. 166; *Seely v. Seely*, 44 Penna. St. 434; *Moody v. Snell*, 81 Penna. St. 359. 2d. To A *for life* with like gift over, *Den v. McMurtrie*, 3 Gr. (N. J.) 276. 3d. To A without words of limitation with like gift over, *Wheatland v. Dodge*, 10 Metc. 502; *Den v. Moore*, Coxe 386; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Jackson v. Bilingier*, 18 Johns. 368; *Willis v. Bucher*, 2 Binn. 455; S. C., 3 Wash. C. C. 369; *Hausell v. Hubbell*, 24 Penna. St. 244; *Covert v. Robinson*, 46 Penna. St. 274; *Greenawalt v. Greenawalt*, 71 Penna. St. 483. 4th. To A and B and *if either die without issue*, to the survivor, *Hall v. Priest*, 6 Gray 18; *Den v. Cook*, 2 Halst. 41; *Beasley v. Whitehurst*, 2 Hawks 437; *Lapsley v. Lapsley*, 9 Penna. St. 130; *Wall v. Maguire*, 24 Penna. St. 248; *Braden v. Cameron*, 1 Grant’s Cas. 60; *Manchester v. Durfee*, 5 R. I. 549; *Sydnor v. Sydnor*, 2 Munf. 263.

(a) 1 P. W. 54, Salk. 236, 2 Vern. 427, 449; see 1 Ves. 26.

[(b) *Per Parker, L. C., Blackburn v. Edgeley*, 1 P. W. 605;] *Langley v. Baldwin*, 1 P. W. 759; *Stanley v. Lennard*, 1 Ed. 87; *Att.-Gen. v. Sutton*, 1 P. W. 754, 3 B. P. C. 75; *Doe d. Bean v. Halley*, 8 T. R. 5; [*Par v. Swindels*, 4 Russ. 283; *Key v. Key*, 4 D., M. & G. 73; *Stanhouse v. Gaskell*, 17 Jur. 157; *Andrew v. Andrew*, 1 Ch. D. 411.]

erty over in case he die without issue, although the prior devise was expressly for life; the intention of the testator being manifest, that the estate should not go over to the next devisee until the whole line of issue was extinct. And it is observable that this construction prevailed in a case, where the words in question were accompanied by expressions which might, if the court had been particularly anxious to escape from the rule, have afforded a plausible ground of dereliction. The case here referred to is *Machell v. Weeding*, (c) Express estate for life enlarged to an estate tail. where the testator gave real and personal *estate to his wife for life, and after her decease to his son J. *for his life*; but if his son *should die without issue, not leaving any children*, then his estates to be sold, and the money divided among his other children. It was contended, that the words "not leaving any children" were explanatory of the preceding words "die without issue," and, consequently, that they did not make J. tenant in tail; but Sir L. Shadwell, V. C., considered that the words in question were included in the previous words; a dying without leaving a child being one mode of dying without issue; and he observed, that it was perfectly manifest that the testator did not intend the estate to go over so long as any issue of the first taker were in existence. "And I consider it," he said, "to be a settled point, that, whether an estate be given in fee *or for life*, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail."

It is to be observed, that where the devise over is to take effect on the event of the prior devisee dying without issue *living at the death*, it has no effect in enlarging a prior estate for life to an estate tail; (d) as the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at *any time*. The only question, in such a case, would be, Estate tail not implied from words referring to issue at the death. whether the words would raise an estate by implication in the issue living at the death. Lord Hardwicke suggested a point of this nature in *Lethieullier v. Tracy*, (e) but the case did not require its determination. It is clear that, where the estate previously devised is in fee, no such implication arises; but this is not quite conclusive, inasmuch as the motive to imply an estate tail in such cases is

(c) 8 Sim. 4.

L. R., 3 H. L. 132, 134, and (*contra*) Id.(d) See *Lethieullier v. Tracy*, 3 Atk. 138.]

774, 793. [See also 8 H. L. Cas. 593; (e) 3 Atk. 796.

much less cogent, since the alternative construction gives the prior devisee an estate in fee simple in the event of his leaving issue; whereby he is enabled to make a provision for such issue, if he leaves any: so that the scheme of disposition which is thus imputed to the testator is reasonable, and wholly free from the inconvenience and objection which attach to a similar construction where the devise is for life only, in which the effect of rejecting the implication is, that, in the event of the first taker leaving issue, the property is undisposed of, as it cannot go to either himself, his issue, or the ulterior devisee.

*And it is to be observed, that where the person, on whose general failure of issue a devise is expressly made expectant, is the heir-at-law of the testator, he becomes, by the application of the rule under consideration, tenant in tail by implication, in precisely the same manner as if there had been a prior devise to him and his heirs in the will. (*f*)

Rule where person whose issue is referred to is heir-at-law of testator.

[But it is not sufficient that the words used by the testator show that he contemplated the determination of the devisee's estate upon a general failure of issue, unless an actual devise over, either express or implied, to take effect in that event, be found in the will. Thus, in *Doe d. Cape v. Walker*, (*g*) where the testator in his will said, "If my son W. (who was the testator's heir-at-law) should die, and having no heirs lawfully begotten, and my freehold messuage should fall by descent unto my granddaughter M.," and then directed his granddaughter to pay certain legacies "within twelve months after she came into possession of the estate," the court held that there was no gift to the granddaughter, and therefore that W.'s estate was not cut down to an estate tail; and *Newton v. Barnardine*, (*h*) where the words, "if R. die before he hath any issue of his body, so that the lands do descend to G.," were held to be a good gift by implication to G., and to raise an estate tail in R., was distinguished on the ground that, in the circumstances contemplated by the testator, G. was not heir of R., and "descend" was not used in its ordinary sense; and they laid stress on the words "so that," as denoting the consequence of an estate tail in R.]

If, however, the person, in default of whose issue the estate is given over, (or the person to whom it is so given,) be not the heir-at-law of the testator, and if the former take no prior estate under the will susceptible of enlargement or modi-

Where he is neither heir nor prior devisee, no implication.

[*(f)* *Goodright v. Goodridge*, Willes 369, 7 Mod. 453; *Daintry v. Daintry*, 6 T. R. 307. (*g*) 2 M. & Gr. 113. And see *Scrape v. Rhodes*, Com. Rep. 542. (*h*) *Moore* 127, *Owen* 29.]

fication from these words, an estate will not accrue to him by implication; and, consequently, the devise, to take effect on the contingency in question, is void for remoteness, as an executory devise limited to arise after an indefinite failure of issue. (i)

In *Gardner v. Sheldon*, (k) (which is a leading authority on this point,) A, having a son and two daughters, devised in the following words:—"If it shall happen my son B *and my two *daughters* die without issue of their bodies lawfully begotten, then all my lands shall remain to my nephew D and his heirs." It was held, 1st, that no express estate was given to the children; and, 2ndly, that they took no estate by implication, because, then, it must be either a joint estate for life, with several inheritances in tail, or several estates tail in succession, one after another. The latter it could not be, because it was uncertain which should take first; nor the former, because the heir-at-law could not be disinherited without a necessary implication, which in this case there was not, for it was only a designation and appointment when the land should come to the nephew, as if he had devised thus: "I leave my land to descend, or give it, to my son and his heirs, till he and my two daughters die without issue, or so long as any heirs of the body of him and my two daughters shall be living," and then to his nephew. (l)

This doctrine, however, has sometimes been considered as shaken by two modern decisions. The first is *Tenny d. Agar v. Tenny v. Agar*. Agar, (m) where a testator devised certain lands to his only son A and his heirs, upon condition that he paid to the testator's daughter B £12 a year until twenty-one, and after that age to pay her £300 for her portion; and in default of payment, that she should enter and hold the lands to her and her heirs forever; and in case his (the testator's) said son *and daughter* happen to die "*without having(n) any children issue* lawfully begotten or to be begotten," then he devised the lands to C in fee. The son entered, and performed the condition. He afterwards suffered a recovery, declaring the uses to himself in fee. The son and daughter both died without issue, the former having devised the property. Against his devisees the heir-at-law of C the

(i) *Ante* p. *254.

(k) *Vaugh.* 259, 1 *Eq. Cas. Ab.* 197, pl. 6, 1 *Freem.* 11.

(l) They also held, that this would be a good executory devise to the nephew; but it is clear that such a devise would

be void for remoteness.

(m) 12 *East* 252.

(n) From other parts of the case it seems the word was "leaving;" but, the subject being real estate, the variation is immaterial.

remainderman brought an action of ejectment, contending that the son and daughter took respectively an estate in fee, subject to an executory devise on their dying "without leaving any child or issue" at their decease, (which, of course, would not have been affected by the recovery,) and not estates tail. But the court held that nothing could be clearer than that the testator intended that C, the devisee in remainder, should not take until the extinction of the lines of issue of both his son and daughter; and that to effectuate this intention the true construction was, that *A should take an estate tail only, with remainder in tail by implication to B, with remainder in fee to C.

The other seemingly opposing case is *Romilly v. James*, (o) where a testator devised to A., his brother, all his real estate, ^{Romilly v. James.} subject to the devises thereafter expressed. He then devised to his brother's son, B., all his estate called M., to hold to him and his heirs forever; and the testator afterwards provided, that *in case his brother and his son should happen to die, having no issue of either of their bodies*, then he devised all his real estate to his nephew J. and his heirs. B. died without having had issue, and A. died without leaving issue. It was contended here, as in *Tenny v. Agar*, that B. took a fee, subject to an executory devise in the event of himself and his father both dying without leaving issue at their respective decease. But the court held that B. was tenant in tail. "The will" (said Gibbs, C. J.) "gives the fee to A. in all which is not afterwards disposed of; the subsequent clause removes that estate in the premises before given to A., and gives a similar clear estate in fee in the premises to B., divesting the estate of the father; (p) but if A. and B. die without having issue, then the estate is given over. This plainly cuts down his (*i. e.* B.'s) estate to an estate tail, and doing so, it leaves something behind which A. may take as part of the real estate of the testator; but the same clause cuts down also the preceding estate in fee given to A. to an estate tail. B., therefore, takes an estate tail, with remainder in tail to his father, remainder in fee to J."

It is observable that, in *Tenny v. Agar*, the only material question was, whether the words, "leaving any child or issue," imported an indefinite failure of issue; (q) for the affirmative of that proposition being established, it was unnecessary to inquire whether the estate of the first taker was cut down to an estate

<sup>Remarks upon
Tenny v. Agar;</sup>

(o) 6 Taunt. 263, 1 Marsh. 592.

batim from the report.

(p) These expressions are taken ver-

(q) On this point see ch. XLI.

tail, with remainder in tail by implication to the other person on failure of whose issue it was given over; or whether the first taker had a fee, subject to an executory devise to arise on these events; for, in the former case, the recovery suffered by the first devisee in tail had acquired the fee simple; and in the latter, the devise over was void for remoteness: so that the title derived from the first devisee *quacunque via* was good. The opinion of the court, therefore, upon the question, whether an estate tail arose by implication, may be considered as extra-judicial. It is *observable, too, that the words referring to the failure of issue may have been intended to cut down the fee simple, which the daughter was to take on the non-performance of the condition by the son, to an estate tail. Lord Ellenborough, in his judgment, assumed that there was a preceding devise in fee to the daughter as well as to the son.

In *Romilly v. James*, the C. J. appears to have considered the general devise to A as a gift of the remainder in fee of the property in question, expectant on an estate tail in B, and that it was in effect a devise to B and his heirs, and in default of issue by him, to A. It is evident, therefore, (whatever may be thought of the soundness of this interpretation,) that this case also is no authority for the proposition, that a devise in default of issue of a person, not heir-at-law and not taking a prior estate by the will, raises in that person an estate tail by implication. A distinct recognition of the contrary doctrine occurs in the later case of *Doe v. Lucraft*, (*r*) which has this peculiarity, that the devise over was in case of the failure of the testator's own issue; (*s*) and it was treated as clear, that the words did not raise an estate tail by implication.

[But there is a difference between a gift over in default of issue of A, to whom no prior estate is given, and a gift over in default of issue of A and B following a devise of a prior estate to A (but none to B.) In the latter case there is good ground for arguing that the same words which raise an estate tail in A shall raise a like estate for B in remainder after the estate tail implied in A; assuming, of course, that the will has not, as was the case in *Gardner v. Sheldon*, left it in doubt whether they were

(*r*) 1 M. & Sc. 573, 8 Bing. 386. [*Qu.* however whether the doctrine is touched by that case; for the failure of issue was held not to be general (which it is essential it should be for the implication of an estate tail), but confined to the testator's death. Moreover, in whom was the estate tail to be implied?]

(*s*) As to these cases *vide post*.

intended to take successively in that order. A strong opinion in favor of such an implication was expressed in *Parker v. Tootal*.] (t)

The rule which implies an estate tail from words importing a failure of issue, was carried to a great length in one case, where the implication was considered not to be repelled by an *express* contingent devise in tail to the same person. (u)

Estate tail implied, notwithstanding express contingent devise in tail.

The testator *bequeathed to A, his only son, an annuity, increasing it at various ages until thirty, and to be paid to him until he married; *and in case he happened to marry before thirty*, then the testator devised to A and the heirs of his body all his real (and personal) estate, subject to the payment of certain sums of money; *and if his said son should happen to die without leaving lawful issue of his body*, then he devised same to his (testator's) brother in fee: and it was held that the latter words raised an estate tail in the son by implication, which was not affected by the non-happening of the event upon which the express estate tail was made to depend, namely, his marrying before the age of thirty.

The contrary hypothesis, namely, that if the devisee attained thirty without marrying, he was to take nothing, imputed to the testator a very absurd intention; but it was difficult to say that the words importing a failure of issue did not refer to the heirs of the body mentioned in the preceding devise.

No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the stat. 1 Vict., c. 26, § 29, provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and it is also provided, that the act shall not apply to cases where the words import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or other-

Effect of stat. 1 Vict., c. 26, upon the implication of estates tail.

[(t) 11 H. L. Cas. 143, by Lords Westbury, Cranworth and Chelmsford: see pp. 159, 169, 173. *Scrape v. Rhodes*, Com. Rep. 542, is sometimes cited *contra*; but there (it was held) was no gift over of the

devised land (in default of issue of the persons named), but only a charge of certain legacies, and the failure of issue was held not to be general.]

(u) *Daintry v. Daintry*, 6 T. R. 307.

wise answer the description required for obtaining a vested estate by a preceding gift to such issue. (x)

Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature.

*A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted. Thus, if, by a will since 1837, real estate be devised to A for life, and in case he should die without issue, to B, A will take an estate for life only, with a contingent remainder to B, to take effect in the event of A's dying without leaving issue at his decease. Whether in such case the issue, if any, living at the decease of A would take the fee by implication, remains to be decided: such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue, and yet, in the alternative event, giving the property neither to A himself, nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying an estate in the issue living at the death, (y) and the contrary conclusion [is supported by *Monypenny v. Dering*, (z) where it was argued that a devise over in default of issue of A, a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that not some only but all the issue should take; but Sir J. Wigram, V. C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates *by purchase* to the omitted issue. He had asked for but did not get any authority for such a proposition.]

[(x) See this section of the statute further observed upon, *post* ch. XL., § 4, and ch. XLI., § 4.]

(y) *Vide ante* p. *555.

[(z) 7 Hare 588.]

If, in a will which is subject to the new law, property real or personal is given in the event of the death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event, leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life interest in the person whose failure of issue is made the contingency on which such gift is to take effect.

Effect where
there is no
prior gift.

If however the devisee on the contingency of the failure of issue of another were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to *give to a person at a future time, that which will intermediately devolve to him by act of law, without providing for its destination in the meantime.

The chief advantages attending the newly-enacted mode of construing words importing a failure of issue are, 1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities, (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes *in esse* within twenty-one years afterwards,) which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, 2ndly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that instead of the ulterior devisee having (as formerly) a remainder in fee expectant on the estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event.

Advantages
and disadvantages
of the
new enactment

Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate, expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee simple; in which case, the existence of issue at his death produces, as already shown, a vacancy in the disposition.

VII.—As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to *children* from a similar limitation over in default of these objects.

*Accordingly, in several cases (a) it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children, (which means without having had a child born, or without leaving a child living at his decease,) (b) then over, does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving, a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

(a) Weakly d. Knight v. Rugg, 7 T. R. 322; Doe d. Barnfield v. Wetton, 2 B. & P. 324; [Addison v. Busk, 14 Beav. 459, 2 D., M. & G. 810; Dowling v. Dowling, L. R., 1 Ch. 612.] In Weakly d. Knight v. Rugg, leasehold property was bequeathed to A, and in case she died without having children, then over; and it was held, that A, on the birth of a child, was absolutely entitled, the only question discussed being, whether the words meant "without having a child born," or "without leaving a child living at the death." In Doe v. Wetton, the devise was to A, her heirs and assigns forever; but if she should die leaving no child, lawful issue of her body, living at

the time of her death, then over. Here the only contested point was, whether the first taker had an estate tail, or an estate in fee defeasible on her dying without issue living at her decease; and the court decided in favor of the latter construction. Lord Eldon, C. J., observed, "if she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. *Nothing, however, is given to them by this will: they are merely named in the description of the contingency on which the estate is to go over.*" [See also Abram v. Ward, 6 Hare 165.

(b) See ch. XXX., § 6.

And even where the language of the will necessarily confines the interest of the parent to his life, [the children will not generally be held to take by implication: it is extremely probable that the testator intended a benefit to them; but *si voluit non dixit.* (c) But it seems that in such a case] the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent.

Where the prior gift to the parent is expressly for life.

Thus, where (d) a testator having by his will bequeathed £1000 to his niece A, by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said £1000 independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, *and at her decease, without child or children*, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Plumer, V. C., was of opinion that by the combined effect of the will and codicil, he was justified in saying that the children took the legacy by necessary implication.

Here, the implication was evidently aided by the testator's prefatory expressions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition; [and, as the V. C. remarked, the children were also the personal representatives of the niece.

Remark on Ex parte Rogers.

Again, in *Kinsella v. Caffrey*, (e) where a testator gave £50 a year

(c) *Ranelagh v. Ranelagh*, 12 Beav. 200; *Greene v. Ward*, 1 Russ. 262; *Sparks v. Restal*, 24 Beav. 218; *Webster v. Parr*, 26 Id. 237; *Neighbour v. Thurlow*, 28 Id. 33. *Wetherell v. Wetherell*, 4 Gif. 51, as ultimately disposed of, 1 D., J. & S. 138, is not *contra*. See also *Cooper v. Pitcher*, 4 Hare 485; *Addison v. Busk*, 14 Beav. 459; *Lee v. Busk*, 2 D., M. & G. 810, where the prior gifts were indefinite, but the gift over being in case the prior lega-

tee died before the testator leaving no child, the result involved was the same as if the prior gift had been for life, *i. e.* the existence of issue who would intercept the gift over without any direct or indirect benefit to themselves.]

(d) *Ex parte Rogers*, 2 Mad. 449. Some of the positions advanced in the judgment in this case must be received with an implied qualification.

[(e) 11 Ir. Ch. Rep. 154.

Ex parte Rogers, followed in Ireland; each to L. and T. for their lives, and on the death of either leaving issue (construed children) his annuity to go to such issue; but if L. or T. should die leaving no issue at his death, his annuity was to go to the survivor for his life, and if both should die leaving no issue, or leaving such *and such issue should die under twenty-one*, both annuities were to sink into the residue. T. died unmarried, and afterwards L. died, leaving children. It was held by C. Smith, M. R. Ir., that L.'s children were entitled by implication to T.'s annuity. "Why," he asked, "was the event of their attaining twenty-one introduced if they were intended to take nothing prior to their attaining twenty-one?"

He relied much on **Ex parte Rogers**, which, however, has been **but questioned in England.** gravely doubted, (f) and the authority of which must be applied with extreme caution. In cases of implication, said Turner, L. J., the court has gone far enough, and it is doubtful whether it would go as far as it formerly did in that direction. (g)

In a case where there was a gift to "the children of A who shall be living at my death, or who shall have died in my lifetime leaving issue, share and share alike," it was argued that there was a gift by implication to the issue of a child who died before the testator; but this, of course, was held by Sir G. Jessel, M. R., to be admissible.] (h)

(f) By Lord Cranworth in *Lee v. Busk*, 2 D., M. & G. 812; by Lord Romilly, *Neighbour v. Thurlow*, 28 Beav. 33.

(g) *Dowling v. Dowling*, L. R., 1 Ch. 615.

(h) *In re Coleman and Jarrom*, 4 Ch. D. 165.

*CHAPTER XVIII.

RESULTING TRUST TO THE HEIR.

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| I. <i>Resulting Trust to the Heir in Real Estate not beneficially disposed of.</i> | II. <i>Effect where particular Estates are void in their Creation.</i> |
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I.—If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property. It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined; or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir-at-law. (a)¹

Effect when will leaves property partially undisposed of.

Trust results to the heir, when.

On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay

(a) Hartop's Case, 1 Leon. 253, Cro. El. 243; and other cases *infra*. [As to trusts for undefined objects, see also *ante* p. *384, *et seq.*] In the case of the legal estate so circumstanced, the lands descend to the heir charged with the trust.

1. See Hill on Trustees (3d Am. ed.) 134, *et seq.*; Lewin on Trusts (2d Am. ed.) 176, *et seq.*; Perry on Trusts, § 160; Bishop's Eq., § 87; Tiffany on Trusts 57; Story Eq. Jur., § 1200; thus also as to persons incapable of taking, King v. Mitchell, 8 Pet. 326; Wright v. Trustees of M. E. Church, 1 Hoffm. 203; Hawley v. James, 7 Paige 213; or renouncing the gift, Helm v. Darby, 3 Dana 185; Owens v. Conans, 7 B. Mon. 152; and in cases where the beneficial gift is for any reason void, Blake v. Dexter, 12 Cush. 559; Stevens v. Ely, 1 Dev. Eq. 493; Huckaby v. Jones, 2 Hawks (N. C.) 120; Haywood v. Craven, 2 Car. Law Repos. 557; Escheator v. Dangerfield, 8 Rich. Eq. 95; or where the interest is undisposed of, Morrison v. Kennedy, 2 Ired. Eq. *379; or where testator directed land to be sold and proceeds to be applied to a purpose which failed, and there was no evidence of an intent to convert the land "out and out" into money, Henderson v. Wilson, 1 Dev. Eq. 313; or where the person or purpose beneficially intended fails, Easterbrooks v. Tillinghast, 5 Gray 17. But where a sale is directed and the proceeds are to be divided among certain persons named, they will also take the intermediate rents to the exclusion of the heir, Current v. Current, 3 Stock. 186.

the rents to A for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of. (b) 2

This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application; but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, *ultra* the purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.

The distinction between the two classes of cases was, in *King v. Denison*, (c) thus stated by Lord Eldon:—"If I give to A and his heirs all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to

(b) *Culpepper v. Aston*, 2 Ch. Cas. 115, 223; *Roper v. Ratcliffe*, 9 Mod. 171, 2 Eq. Cas. Ab. 508. In both the above propositions, however, it is assumed that the subject of disposition is the testator's general or residuary real estate, or that the will does not contain a residuary devise, the effect of which to pass the undisposed of interest in particular lands is considered in ch. XX.

2. See *Lewin on Trusts* (2d Am. ed.) 176; *Story Eq. Jur.*, § 1200; *Theobald on Wills* 449. Cases of this sort occur frequently where a conversion is directed for a particular purpose, which exhausts the proceeds of the conversion only in part. The rule is that such conversion

takes effect only *pro tanto* and the unexhausted balance retains its original character of realty and goes to the heir, *Lewin on Trusts* 182; *Hill on Trustees* 142; *Bispham's Eq.*, § 314; *Tiffany on Trusts* 67, 75; *Wms. Ex'rs* (6th Am. ed.) 736; see also *infra* p. 211 and notes; *Wood v. Cone*, 7 Paige 472; *McAuley v. Wilson*, 1 Dev. Eq. 276; *North v. Valk*, C. W. Dud. Eq. 212; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *Wright v. Trustees, &c.*, *supra*, 1 Hoffm. 203; *Hawley v. James*, 7 Paige 213; *Estate of Tilghman*, 5 Whart. 44. See also on this point the notes to chapter XIX.

(c) 1 Ves. & B. 272.

the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

In illustration of this subject, it is proposed to state a few of the leading cases, showing, first, where a trust has been held to result; and, secondly, where not.

In *Wych v. Packington*, (*d*) a testator, after appointing his wife S. sole executrix of his will, devised to his said dear wife, his executrix, a rent-charge of £200 per annum, out of ^{Cases of result-} certain lands, upon trust that she, her executors, &c., should be supplied with moneys out of the rents and profits for the discharging his debts, legacies, and payments; to which end he gave and bequeathed to her a lease for thirteen years of the said rent-charge, to commence six months after his decease. And the testator devised to his wife certain lands for life, in augmentation of her jointure; and the residue of his lands to his daughter (who was heir-at-law) in tail. The personal estate being found sufficient to satisfy the debts and legacies, it was not necessary to resort to this fund. The House of Lords, affirming a decree of the Court of Exchequer, held that the rent-charge resulted to the heir.

So, in a case which arose on the will of Serjeant Maynard, (*e*) who devised his lands to three persons, to the use of them and their heirs, upon the trusts after mentioned; and then directed the trustees, upon the death of the countess, his wife, to convey the estate to certain persons for life; but without disposing of the remainder in fee. It was contended that the devise, being *to them and their heirs, upon the trusts after mentioned, imported that they should be trustees only for those purposes; and when those estates were spent, the land was to remain to them to their own use. But the L. C. held, that the remainder in fee resulted to the heir, adverting to the circumstance that the devise was to three persons, and one of them no relation to the testator.

[And in *Watson v. Hayes*, (*f*) the testator devised all his real estates to trustees, "in trust to and for the purposes hereinafter mentioned;" he then desired his estates to be sold, and out of the produce an annuity for life and a sum of money to be paid to his natural daughter, and also an annuity of £400 to his wife for her life, and the residue of the

(*d*) 3 B. P. C. Toml. 44. [See also *Collis v. Robins*, 1 De G. & S. 131; *Barrs v. Fewkes*, 2 H. & M. 60.] *Wills v. Wills*, 1 D. & War. 439; *Bird v.*

(*e*) *Hobart v. Countess of Suffolk*, 2 Harris, L. R., 9 Eq. 204. Vern. 644, 1 Eq. Ab. 272, pl. 7; [see (*f*) 5 My. & Cr. 125.]

income to be applied for the maintenance of his children till they attained twenty-one, "when it is my will that they shall respectively receive the principal, or one-fifth part of such sum as may remain, after first reserving a sufficient capital, the interest arising from which shall be sufficient to pay the above annuity of £400 to my said wife and my legacy to my natural child." The testator left five legitimate children. It was held that there was no gift of the moneys to be set apart to produce the annuity of £400, but that those moneys resulted to the heir-at-law as a part of the real estate undisposed of.]

It is clear that where lands are devised upon trust for sale, the resulting trust in favor of the heir is not repelled by a mere bequest to him of a sum of money payable out of the proceeds.

Thus, (*g*) where a testator devised lands to his executors and their heirs, in trust, to be sold by them, and the survivor of them, for the best price, and with the money to pay his debts, legacies, and funeral, and among the legacies were two to his coheirs: it was contended, on the authority of *North v. Crompton*, (*h*) that, there being legacies to the heirs, and none to the executors, the latter must take for their own benefit; but Lord Cowper, C., held, that the trust resulted to the coheirs, adverting to the direction to the executors to sell for the best price, which need not have been inserted if they were intended to be owners; (*i*) and also the devising the estate to the survivor, which, he observed, was a further argument of its being rather a trust than an ownership.

*Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced; but the contest in such cases generally lies between the heir-at-law and the residuary legatee, or next of kin, whose respective claims are discussed in the next chapter.

So, where (*k*) a testator devised his manors, advowsons, &c., to trustees in trust, to pay his son £1000 a year for his life, and the rest of the profits to be laid out in land, to be settled to certain uses; Lord Hardwicke held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and devolved to the heir; no other profits being given than such as might be accumu-

(*g*) *Starkey v. Brooks*, 1 P. W. 390; see *Randall v. Bookey*, 2 Vern. 425. creditors, which might have absorbed all?

(*h*) 1 Ch. Cas. 196; see also *Halliday v. Hudson*, 3 Ves. 210. (*k*) *Sherrard v. Lord Hardborough*, Amb. 165; see also *Kellett v. Kellett*, 3 Dow 248.

(*i*) Why not, as there was a trust for

lated; though, he said, if the testator had devised all the surplus rents and profits, it would have carried the right of presentation. (l)

And here it might be observed, that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his personal representative. (m)

As to chattel interest devolving upon the heir.

We now proceed to the cases in which a trust has been held not to result, there being an apparent intention to give the devisee as well the beneficial interest as the legal estate.

Cases in which devisees held to take beneficially.

In *Hill v. Bishop of London* (n) a testator devised his perpetual advowson of B., in the county of H., to his honored mother-in-law G. S., willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another, in a prescribed order. Item, he gave to his said mother-in-law his freehold lands in the parish of O., and to her heirs and assigns forever. It was held, that the *beneficial interest in the advowson included in the first devise did not result to the heir. "The general rule," said Lord Hardwicke, "that, where lands are devised for a particular purpose, what remains after that purpose is satisfied results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the

Effect of direction to sell to certain persons.

(l) With this *dictum* agrees *Earl of Albermarle v. Rogers*, 2 Ves., Jr., 477, 7 B. P. C. Toml. 522, where a testator devised all his manors, messuages, lands and hereditaments to A for eleven years from his death; and from the end, expiration, or sooner determination of the said term, and in the meantime subject thereto, to B and his issue in strict settlement. The term was declared to be bequeathed to A, upon trust, to receive the rents, issues and profits of the premises, and thereout to pay certain charges therein mentioned, *paying the overplus of such moneys to the testator's daughter E.* During the eleven years an avoidance occurred in an advowson forming part of the property, and the next presentation was claimed by B, as the devisee of the

estates subject to the term, the trusts of which, it was said, did not comprise an interest of this description; and also by E, either as the *cestui que trust* of the residuary rents, issues, and profits, during the term, or as heir-at-law; and it was held to belong to her in the former character, the entire beneficial interest during the term, not absorbed by the charges, being given to her. [See also *Johnstone v. Baber*, 6 D., M. & G. 439: but see *Martin v. Martin*, 12 Sim. 579.]

(m) *Levet v. Needham*, 2 Vern. 138; see also *Wych v. Packington*, 3 B. P. C. Toml. 44, stated *ante* p. *566; [*Hewitt v. Wright*, 1 B. C. C. 90; *Sewell v. Denny*, 10 Beav. 315; *Burley v. Evelyn*, 16 Sim. 290; *Whitehead v. Bennett*, 18 Jur. 140.]

(n) 1 Atk. 618.

money go where it will; yet there is no precedent for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lands to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust." There were in this case, he observed, two objects of the testator's benevolence, G. S. and the colleges.

He also adverted to the circumstance that the word *trust* was not made use of; but this, though not immaterial, is by no means conclusive; for a trust may be created without that word, if such an intention can be collected from the whole will. (o)³

Lord Hardwicke's statement of the general rule may seem to clash with Lord Eldon's, before cited. He appears to have confounded the distinction, so clearly marked by Lord Eldon, between a devise *for*, (p) and a devise *subject to*, a particular purpose; but, as the case before Lord Hardwicke seems to belong to the latter class, it is in accordance with that distinction. The frame of the devise and the context (for it was immediately followed by a devise, clearly beneficial, to the same person) certainly favored the construction adopted. The case suggested by his lordship, of a devise to A to sell for the best price to B, perhaps, is more open to doubt. He admitted, however, that, under a devise of lands to be sold for payment of debts, there was a clear resulting trust.

The resulting trust for the heir in lands devised for a particular purpose is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

*Thus, (q) where a testator, having given £5 to his brother, (who

(o) *Halliday v. Hudson*, 3 Ves. 210; and see *King v. Denison*, 1 Ves. & B. 273; [*Saltmarsh v. Barrett*, 29 Beav. 474, 3 D., F. & J. 279 (on the word "charged"); *Barrs v. Fewkes*, 2 H. & M. 60 ("to enable"); *Bird v. Harris*, L. R., 9 Eq. 204 ("in consideration.") And a trust will not be created by the word "trust," if an intention not to do so appears by the whole will, *Hughes v. Evans* and *Williams v. Roberts*, both stated *post* pp. *571, *572; *Clarke v. Hilton*, L. R., 2 Eq. 810.]

or recommendation will not create a resulting trust, *Hess v. Singler*, 114 Mass. 56; *Spooner v. Lovejoy*, 108 Mass. 529; *Warner v. Bates*, 98 Mass. 274; *Van Dwyne v. Van Dwyne*, 1 McCart. 397; *Pennock's Estate*, 20 Penna. St. 268; *Tiffany on Trusts* 47, 223; *Story Eq. Jur.*, § 1069.

(p) See *Abrams v. Winshup*, 3 Russ. 350, where the word "for" was read as "charged with."

(q) *Rogers v. Rogers*, 3 P. W. 193, Cas. t. Talb., p. 530.

3. But the mere expression of a desire

[*570]

was his heir,) made and constituted his dearly-beloved wife his sole executrix and *heiress of all his lands* and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, Lord King held, she was not, after payment of debts, a trustee for the heir. He said that the devise that the wife should be sole heiress of the real estate, did, in every respect, place her in the stead of the heir, and not as a trustee for him; that it was plainer by reason of the language of tenderness, his “dearly-beloved wife,” which must have intended something beneficial to her, and not what would be a trouble only; and what made it still stronger was, that the heir had a legacy.

*Of expressions
of kindness.*

That neither of these two circumstances alone is sufficient, is quite clear. The former occurred in *Wych v. Packington*,^(r) where the expression was “my dear wife,” and yet the trust was held to result; and the latter, in *Randall v. Bookey*,^(s) where a legacy to the heir was decided not to rebut the inference of a resulting trust.

Where the devisee is merely described by the relationship, as “my cousin,” “my brother,” unaccompanied by any particular expression of kindness, the argument is still less strong, the designation being merely part of his description; though certainly, in *Coningham v. Mellish*,^(t) the fact of the devisee being described as “my cousin,” and that of his being as nearly related to the testator as the heir, seem to have formed the grounds of the determination. In the cases of that period, however, the doctrine of resulting trusts was not so invariably and steadily maintained as it is now; and many positions to be found in them are inconsistent with the rules at present established. Such a description of the devisee is certainly a circumstance to be attended to, and was so referred to by Lord Eldon, in reference to *Coningham v. Mellish*; ^(u) but that it would now be allowed the weight which was given it in that case, is not probable.

*Of describing
devisee by re-
lationship.*

[Where the gift to the devisee was in the first instance expressly upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, *and having expressly declared that the heir should take nothing

*No trust,
though word
“trust” used.*

(r) Stated *supra*, p. *566.

Vern. 247.

(s) 2 Vern. 425, 1 Eq. Ab. 272, pl. 4; [and see *Hughes v. Evans*, 13 Sim. 504.] (u) See *King v. Denison*, 1 Ves. & B. 274. [See also per Wood, V. C., *Barrs v.*

(t) Pre. Ch. 31, 1 Eq. Ab. 273, pl. 8, 2 Fewkes, 2 H. & M. 67.

except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared.](x)

In *Rogers v. Rogers*, the purpose expressed, namely, the payment of debts and legacies, was not beneficial to the devisee; and, therefore, unless she had taken the surplus, she would have derived no benefit from the devise. It has been truly said that "where the purpose expressed is something in favor of the party to whom the bequest is made, the presumption is rather stronger that the benefit specified is the only benefit which he is intended to derive from the bequest." (y)

In *Dawson v. Clarke*, (z) a testator gave to his friends A and B all his real and personal estate, to hold to them, their heirs, executors, administrators, and assigns, upon trust in the first place to pay, and charged and chargeable with all his just debts and funeral expenses and the legacies thereafter bequeathed. The testator, after bequeathing several legacies, appointed A and B executors. Lord Eldon,— "The question is, whether, upon the whole will, this is to be taken as a devise and bequest to these executors with reference to their office, upon a trust to pay; or as giving them the absolute property subject only to a charge; and I think the latter was the intention."

Of this case Lord Langdale, M. R., (a) has observed that Lord

(x) *Hughes v. Evans*, 13 Sim. 496.]

(y) Per Sir W. Grant, in *Walton v. Walton*, 14 Ves. 322.

(z) 15 Ves. 409, 18 Ves. 247. This case was decided at the Rolls, in reference exclusively to the personal estate. [See also *Clarke v. Hilton*, L. R., 2 Eq. 810. Executors by their mere appointment were formerly entitled at law to the residue of personalty not expressly disposed of: and equity followed the law unless the next of kin could show from the will an intention that the executors should be trustees. This burden of proof was shifted by 1 Will. IV., c. 40; *Juler v. Juler*, 29 Beav. 34; *Travers v. Travers*, L. R., 14 Eq. 275; and the question now seldom arises; but it arose in *Harrison v. Harrison*, 2 H. & M. 237, and was there decided in favor of the executor. Whether executors claiming, not merely *virtute officii*, but by express gift, were entitled for their

own benefit, was before the act treated as a separate question depending on the general principles discussed in the text, *Mapp v. Elcock*, 2 Phil. 793, 3 H. L. Cas. 492; *In re Henshaw*, 34 L. J., Ch. 98; and (notwithstanding *Love v. Gaze*, 8 Beav. 472) it has been decided that this question is not affected by the act, *Williams v. Arkle*, L. R., 7 H. L. 606. See also *Saltmarsh v. Barrett*, 29 Beav. 474, 3 D., F. & J. 279. Of course the act is inapplicable to a gift to one of several executors, *Clarke v. Hilton*, L. R., 2 Eq. 810. By section 2 the act is not to apply as between the executor and the crown, where there is no next of kin, *Cradock v. Owen*, 2 Sm. & Gif. 241; *Powell v. Merrett*, 1 Id. 381; *Read v. Stedman*, 26 Beav. 495; *Dacre v. Patrickson*, 1 Dr. & Sm. 182.]

(a) 1 Kee. 324.

Eldon gave effect to the words "charge and chargeable," (which he had placed in opposition to the words "upon trust,") on some ground which does not appear in the report. It might be that he considered the last words in the will as explanatory of the first.

Lord Langdale's remark on *Dawson v. Clarke*.

The general doctrine was much discussed in *King v. Denison*, (b) *where a testatrix devised her real estate to her cousin Mary A., wife of R. A., and to her cousin Arabella J., and their heirs and assigns forever; *subject, nevertheless, to, and chargeable with*, the payment of the annuities thereafter mentioned; and she bequeathed her personal estate to three other persons, subject to, and chargeable with, her debts and legacies; and gave such three persons equal legacies. Lord Eldon held, that the devisees of the real estate were not trustees, after paying the annuities, for the heir-at-law; he thought the intention was, (according to the distinction stated by him, already quoted,) that they should not take merely *for the purpose of paying* those annuities, but beneficially, *subject to* them. The Court of K. B. had made a similar decision upon the same will. (c)

A devise subject to certain annuities.

It happened in this case that one of the devisees was a married woman, and the other an infant of fifteen: persons, therefore, ill adapted to be trustees. But, though Lord Eldon admitted these were circumstances to be attended to, (d) yet, he observed, that, if they were trustees upon the whole context, he could not say that they were not so on that ground; and upon the singularity that the testatrix had given to these cousins in preference to nearer relations, a sister and aunt, he said the answer was, she had made the disposition.

Circumstance of devisees being a married woman and an infant;

—and not testator's nearest relatives.

Another circumstance in the case was, that the testatrix had used the same expression, "subject and chargeable," in the bequest of the personal estate to her executors, of which it was contended they were trustees, in consequence of having equal legacies given them; but Lord Eldon observed, that, admitting this construction as to the personalty, which he thought doubtful upon the cases, it did not follow that the same words, in different parts of the will, applied to a different subject, were to receive the same construction. It was only the same as if she had said that the executors should

Of their being trustees of the personal estate.

(b) 1 Ves. & B. 261.

684, ante p. *389; [*Briggs v. Penny*, 3

(c) *Smith d. Denison v. King*, 16 East Mac. & G. 546.]

283; see also *Wood v. Cox*, 2 My. & Cr. (d) See *Blinkhorn v. Feast*, 2 Ves. 27.

not take the personalty beneficially, but had made no such declaration as to the real estate. (e)

[Lastly, in *Williams v. Roberts*, (f) where a testator gave all his real and personal estate to his wife, her executors and administrators, upon trust to pay to his daughter an annuity during the life of his wife, and upon further trust that she, the said executrix, *at the time of her decease, should cause her executors, administrators, or assigns, to pay or cause to be paid to certain *persons, should they survive his wife, certain legacies, which did not exhaust the beneficial interest; it was held, notwithstanding the express words of trust, that the undisposed-of interest belonged to the testator's wife and executrix, "the will being inconsistent with the notion that she was not to have a beneficial interest in the property."*]

It should be noticed that an exception to the doctrine of resulting trusts exists in regard to gifts to charity; the rule being, that where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir-at-law. (g)⁴ It has been observed by Lord Hardwicke (h) and Lord

As to resulting trust in lands given to charity.

(e) But see *Countess of Bristol v. Hungerford*, 2 Vern. 645.

(f) 4 Jur. (N. S.) 18, 27 L. J., Ch. 177.]

(g) *Thetford School Case*, 8 Co. 130; *Duke's Ch. Uses* 71; *Sutton Colefield Case*, 10 Rep. 31; *Duke* 68; *Att.-Gen. v. Johnson*, Amb. 190; *Att.-Gen. v. Sparks*, Amb. 201; *Att.-Gen. v. Haberdashers' Company*, 4 B. C. C. 103; *S. C.*, *nom. Att.-Gen. v. Tonna*, 2 Ves., Jr., 1; see also *Bishop of Hereford v. Adams*, 7 Ves. 324; [*In re Jortin*, Id. 340; *Att.-Gen. v. Wansay*, 15 Id. 231; *Att.-Gen. v. Drapers' Company*, 4 Beav. 67; *Att.-Gen. v. Wax Chandlers' Company*, L. R., 6 H. L. 1.]

4. "It may be noticed that settlements to charitable purposes are an exception from the law of resulting trusts; for upon the construction of instruments of this kind, the court has adopted the two following rules:—1. Where a person makes

a gift, whether by deed or will, and expresses a general intention of charity but either particularizes no objects or such as do not exhaust the proceeds, the court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention by declaring the particular purposes to which the fund shall be applied. 2. Where a person settles lands or the rents and profits of lands to purposes which at the time exhaust the whole proceeds but in consequence of an increase in the value of the estate an excess of income subsequently arises, the court will order the surplus, instead of resulting to the heir, to be applied in the same or a similar manner with the original amount," *Lewin on Trusts* 198; so, too, *Perry on Trusts*, § 160; *Hill on Trustees* 134.

(h) Amb. 190.

Eldon, (i) that, at the time this doctrine was established, the right of the heir-at-law under a resulting trust was not sufficiently understood, or it never could have been adopted. Both these great judges, however, acknowledged it to be a principle not now to be shaken. But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate. (j)

[It may be here observed that where property, vested in a trustee for the testator, is devised to other trustees for purposes which do not appear, or which are void, or fail, so that the heir, if there be one, would be let in, then in case of there being no heir, the trustees under the will can claim a conveyance from and enjoy the property beneficially as against the prior trustees.] (k)

II.—Another question which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, *a particular estate be void in its creation from being limited to a person incapable by law or refusing to take, Destination of particular estates void in their creation. the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir-at-law as real estate undisposed of.

The early authorities are clearly in favor of the acceleration. Thus, it is laid down in Perkins, (l) that, "if a man, seized of land devisable in fee, devised it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently." [But Sir J. Leach, M. R., put this case on the ground that the monk was actually dead in the eye of the law. (m) So if land be devised to an attesting witness with remainder over, the remainder takes effect at once.] (n) Ultior estate held to be accelerated.

(i) 2 J. & W. 307.

(j) Lord Eldon in *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 307; [and *Att.-Gen. v. Skinners' Company*, 2 Russ. 443. See also *Mayor of Beverley v. Att.-Gen.*, 6 H. L. Cas. 310.] But as charitable dispositions of lands by will are prohibited by the statute of 9 Geo. II., c. 36, (*ante* p. *219,) unless in favor of certain objects,

this question rarely occurs, except under wills which are prior to the statute.

[(k) *Onslow v. Wallis*, 1 Mac. & G. 506.]

(l) 567. See also §§ 567, 569; and *Shep. Touch.* 435, 451.

[(m) 2 My. & K. 779.

(n) *Jull v. Jacobs*, 3 Ch. D. 703.]

So it was held by Gawdy, J., in *Fuller v. Fuller*, (o) (though the case did not raise the point,) that if the devisee of an estate tail refuse, the devisee in remainder shall take immediately. And the same point, in regard to a devisee for life, was maintained *arguendo* in Crammer's Case. (p)⁵

As to acceleration by revocation of previous estate.

The principle of these cases undoubtedly applies to the case of a devise of a life estate being revoked by the testator : [and this has been so decided.] (q)

The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture; and it seems not to be (as commonly supposed) contradicted by *Carrick v. Errington*, (r) where a man settled [the equitable fee simple of] lands to the use of T. E. (a papist) for life; remainder to trustees during *T. E.'s life, to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to W. E. The limitations in favor of the papist were, in the then state of the law, (s) void; and it was held, that the remainders were not accelerated, *on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E.* [This special ground seems to resolve itself into the common rule, that a contingent remainder in an equitable estate does not fail by the determination of the previous estate, and it then necessarily followed, that the intermediate equitable interest during the life of T. E., being undisposed of, resulted,

(o) Cro. El. 423. [So where devisee in tail died, though he left issue, *Hutton v. Simpson*, 2 Vern. 723; but see now 1 Vict., c. 26, § 32.]

(p) Dy. 310, a.

5. See *Yeaton v. Roberts*, 28 N. H. 459; *Adams v. Gillespie*, 2 Jones Eq. 244.

[(q) *Lainson v. Lainson*, 18 Beav. 1, 5 D., M. & G. 754.]

(r) 2 P. W. 361, 5 B. P. C. Toml. 391. [It is not stated in P. W. that the settlement was an equitable one, and consequently the case reads as if it were a direct authority that removal of the prior

estate brought the estate in remainder of the trustees to preserve into possession; but see Lord Hardwicke's statement of the case in *Hopkins v. Hopkins*, 1 Atk. 597, and the statement of the case in *Brown*, and in 6 Bac. Abr. Gwil. 128. An express provision that in a certain event the estate for life shall cease as if the devisee were actually dead, clearly points to acceleration, *Craven v. Brady*, L. R., 4 Eq. 209, 4 Ch. 296.]

(s) But now see statute 18 Geo. III., c. 60.

according to another common rule; to the grantor. It was also argued that W. E. ought to be let in until there was issue of T. E., and then that such issue would be entitled: but Lord King said the court would not "take upon itself so to direct and displace estates." "There is no case," said Sir J. Romilly, M. R., in *Sidney v. Wilmer*, (t) "in which the estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued before his estate took effect." (u)

In some cases, those for instance of a void limitation in tail, the result of deciding against acceleration would be to make the subsequent limitations void, as being, in that view, executory devises to take effect on an event too remote, namely, the indefinite failure of issue of the intended devisee in tail. Any effect which might be attributed to this consideration must of course be extended to all cases alike, as a test of the general principle, and not applied as a circumstance which ought to influence the determination of the particular case where the remainder would otherwise be void. (x)

Estate if not accelerated may be too remote.

Whether the same principles are applicable to quasi-remainders of personalty appears to be undecided. Sir J. Romilly said not as a general rule; though in the case before him he held that there were special circumstances strong enough to create an exception. (y) In *Lainson v. Lainson*, (z) where a remainder in *freeholds was held to be accelerated by the revocation of the life estate, the remainder in leaseholds bequeathed on corresponding trusts was held by the same judge to be also accelerated. And a similar decision was made by Sir R. Malins, V. C., in *Jull v. Jacobs*. (a) It is difficult to state any but a technical distinction on this head between real

Whether same rules apply to personalty.

[(t) 25 Beav. 266. See further as to this case and as to the destination of interim rents, *post* ch. XX., § 1.

(u) See also *Wade-Gery v. Handley*, 1 Ch. D. 653, 3 Id. 374; *Chambers v. Brailsford*, 18 Ves. 375, *ad fin.*; *Andrew v. Andrew*, 1 Ch. D. 414. But shifting clauses usually provide expressly or by implication for the destination of the rents in the meantime, *Turton v. Lambarde*, 1 D., F. & J. 516; *D'Eyncourt v. Gregory*, 34 Beav. 36.

[(x) See *ante* p. *293. And see *In re*

Colson's Trusts, Kay 135, where the enjoyment of an accumulation fund was accelerated, the devisees in tail of the estate for whose benefit it was created having barred the entail.

(y) *Eavestaff v. Austin*, 19 Beav. 591.

(z) 23 L. J., Ch. 170. Compare *David v. Rees*, 1 R. & My. 687, where stock was bequeathed in trust for A for life, remainder to B for life: by codicil an annuity to A was substituted for his life estate, and B's interest was held not accelerated.

(a) 3 Ch. D. 703.

and personal estate. But if a void prior gift is made defeasible, and the subsequent gift is limited to take effect, in a particular event, and the very opposite or alternative of that event actually happens, the subsequent gift fails altogether, though the prior gift, being void, is out of the way.] (b)

The doctrine of acceleration underwent much discussion in *Tregonwell v. Sydenham*, (c) where a testator devised certain estates at S., subject to some terms of years, to the use of his son A for life; remainder to trustees, during his life to preserve contingent remainders; remainder to the first and other sons of A in tail male; remainder to the eldest daughter of A in tail general; with the like remainder to his second and other daughters, and divers remainders over. The testator then devised estates at D., subject to certain terms of years, to A for life; remainder to his first and other sons in tail male; remainder to the second and other sons of the testator in tail male; and, in default of his male issue, as to that part of those estates called C., remainder to the use of the testator's brother B for life; remainder to his first and other sons in tail male, and, after several other remainders, remainder to the plaintiff J. for life; remainder to his first and other sons in tail male; remainder to the testator's right heirs. And as to all other his estates in D., to retain the same for sixty years, and receive the rents and grant leases until the trustees should have received £17,500, which they should apply to the uses following: viz. when they should have received £2500, to lay out the same, with the interest, in some real estate in certain parishes, and settle the estate so purchased on such person for life as, by virtue of his said will, should then be in possession of his estate at S., or in case, by suffering a common recovery, that estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same; and so, from time to time, as soon as the further sum of £2500 should be raised, until the whole *£17,500 should be so raised, should lay out the same in lands as thereinbefore directed, to be settled on the several persons as should be, or should have been, in case no such common recovery had been suffered at each of the said times, in possession of his S. estate, with such remainder on each of the said settlements as might continue the said estates in the

Tregonwell v. Sydenham.

Devise to take effect after raising of a sum of money for certain purposes not accelerated by failure of the purposes.

(b) *Lomas v. Wright*, 2 & My. K. 769.] (c) 3 Dow 194.

blood and name of the St. Barbes; and, after the said £17,500 should be so raised, then to raise the further sum of £2500, to be laid out in some real estates in some or one of the parishes of D, E, &c., and to settle the said estate so purchased on such person for life as, by virtue of that his will, should then be in possession of the estate of D.; or, in case of suffering a common recovery or otherwise, his said estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same by virtue of his will, with such remainder as might continue the same in the name and blood of the Sydenhams. *And after the said two sums, amounting to £20,000 and expenses, should be raised for the said uses, or determination of the said term of sixty years*, then to the use of the testator's brother B. for life, with remainder to his eldest and other sons in tail male; and, after such other remainder as he had limited with respect to the first part of his D. estate, remainder to J. the elder plaintiff, for life; remainder to his first and other sons in tail male, with the ultimate remainder in fee to the testator's right heirs. The testator died, leaving A, his only son, and two daughters. A died in 1799, leaving his grandson T., the only son of one of his daughters, his heir-at-law. A, B and several of the intermediate devisees, (d) having died without issue male, the plaintiff J. the elder, became entitled to an estate for life in possession in the property at C., and plaintiff J., the younger, (his eldest son,) to an estate in remainder therein. T. was tenant in tail of the S. estate; and, as to the second part of the D. estate, the trusts of the term had not been executed. On a bill filed by J. and J. the younger to have the trusts of the term declared void as tending to a perpetuity, and that the residue should be assigned for their benefit, the Court of Exchequer declared the trusts to be void, and the term to attend the inheritance. But the House of Lords, on appeal, reversed the decree; declaring, first, that the trusts of the term were *not* void in their creation, but became so in event, the trusts for raising the money being valid; but that *of settling the lands to uses being void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death.(e) Secondly, (and this is the point

Term for raising certain moneys for void purposes held to belong to the heir.

(d) It is stated in the report that they died in the testator's lifetime, but this appears to be a mistake.

(e) On this point *vide ante* p. *276.

material to the present discussion,) that the trusts of the term resulted for the benefit of the heir-at-law of the testator.(f)

The argument of Lord Redesdale and Lord Eldon, upon which this part of their decision turned, was, that the land, not being given over until "from and after" the raising of the money, the intermediate interest was evidently not included in the devise, and, therefore, went to the heir. The interest given to the devisee was exclusive of, and with a deduction of, that sum. "The testator, then," observed Lord Eldon, "has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of a testator with respect to a purpose which the law will allow, the doctrine of law is, that *he* shall take the interest who takes independently of all intention, and on whom the law casts it. On these grounds, I agree that the money must be raised and applied for the benefit of the heir, and not of the devisees."(g)

It is evident that the two points decided in *D. P.* had no necessary connection; or, in other words, that the deciding the heir to be entitled was not a consequence of holding the trusts of the term to be void in event only, and not in their creation; for Lord Eldon expressly laid it down, that, if the trusts had been to raise £20,000 for charities, (in which case they would have been clearly void *ab initio*,) and after the sum had been raised, then to the devisees, as the intention would not have been in their favor, the heir would have been let in.(h)

It is clear, however, that where a term of years is created for particular purposes, and the land *subject thereto* is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee. And such was the decision in **Davidson v. Foley*,(i) although the nature of the trust and the expressions of the testator

Remark on
Tregonwell v.
Sydenham.

Term for
years, trust
being satisfied,
or not arising,
attends inheritance
for the benefit
of devisee.

[(f) Lord St. Leonards, in *Law of Prop.* p. 362, says, "I prefer the decision of the Exchequer."]

(g) And with this doctrine the cases on the statute restraining accumulation of income (*ante* p. *311) seem to agree.

[(h) But in the case put, not only the gift of the £20,000, but also the term would

have been void *ab initio* (*ante* p. *226), and the reversioner, and not the heir, would then have become entitled in possession. See *Williams v. Goodtitle*, 5 M. & Ry. 577, *post.* p. *580.

(i) 2 B. C. C. 203. See Lord Eldon's judgment in *Sidney v. Shelley*, 19 Ves. 364.

afforded an argument in favor of a contrary construction. The testator devised lands to trustees, their executors, &c., for ninety-nine years, upon the trusts after mentioned, and, after the expiration or other determination thereof, and subject thereto, to A, testator's son, for life, remainder to his first and other sons in tail male. Another term was created, in the same manner, of property similarly given to B, another son, and his sons in tail male. The trusts of the respective terms were for the trustees, in their discretion, to pay testator's two sons an annual allowance, not exceeding a given sum, but so as that *they should have no estate or interest in the rents of the property for their lives*, other than the trustees, in their discretion, should think proper; and then to pay off a certain mortgage; and then to pay certain debts of his sons, but so that the testator's sons' creditors should have no lien upon the land; and, *after the decease of his sons*, and the payment of the mortgage-money and debts before mentioned, and the costs, the terms were to attend the inheritance. Lord Thurlow was of opinion, that, as the purposes for which the terms were created were exhausted, the terms attended the inheritance for the benefit of the tenants for life. It had been ingeniously argued, he said, that these were trusts extending beyond the lives of the sons, and that, if those trusts were sufficient, the sons were to have no interest for their lives. But the nature of a resulting trust was, that it was such as had escaped the attention of the testator, and that here the intention of raising a trust beyond the payment of debts was totally unexpressed. No trust could be raised upon the terms used.

Lord Thurlow's reasoning evidently assumes that the devise, subject to the term, comprised all the interest not actually absorbed by the trusts of such term; and this may serve to reconcile some expressions in his judgment, which might otherwise seem to warrant a conclusion more favorable to the heir than to the devisees.

The same principle was applied where a term for years was devised, upon trusts to be thereafter declared, (but which were not declared,) with devise over on the "expiration or sooner determination" of the term, the words "subject thereto," though not actually occurring in the will, being by force of the intention appearing upon the general context, supplied. As, in *Sidney v. *Shelley*,^(k) where A devised lands to trustees and their heirs, to the use of them, their executors, &c., for ninety-nine

Case in which term was created, but no trusts were declared.

(k) 19 Ves. 352.

years, "upon the trusts hereinafter expressed and declared concerning the same, and from and after the expiration or other sooner determination of the said term of ninety-nine years," he gave the said lands to several persons for life and in tail; and the will contained no declaration of the trusts of the term: it was strongly contended that the trusts resulted to the heir, chiefly on the authority of a *dictum* of Lord Hardwicke,^(l) in a case wherein a term of ninety-nine years having been created by settlement, without any declaration of trust, he is made to say, upon the question whether there was a resulting trust for the settlor, "It has been determined so in the case of voluntary settlements and wills;" distinguishing a settlement for valuable consideration. But Lord Eldon, in the principal case, decided that the testator, having created a term for ninety-nine years, upon trusts to be afterwards declared, and, at the expiration or sooner determination of that term, having devised those estates in such a manner as that the actual enjoyment of them was clearly intended; the termors having nothing for their own use, and he not having declared any trust, the result was exactly the same as if some trust had been declared, which it became unnecessary to satisfy, or which was satisfied after his death. He considered that the will was to be read as if the words "subject to the trusts thereof" were in it.

Lord Eldon observed, that, if the limitation had been simply to the trustees, without reference to any trusts, however mon-
As to terms not upon trust. strous the supposition with reference to the intention, the subsequent devisees must have taken subject to the term.

[If the limitation of the term itself is void, as where
Reversion accelerated where term is void. trusts are declared in favor of a charity, the devisee of the freehold is, of course, immediately entitled in possession.^(m)

The doctrine of acceleration does not extend to estates limited under
As to appointments under powers. powers of appointment; where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment.⁽ⁿ⁾]

^(l) In *Brown v. Jones*, 1 Atk. 191. A note of this *dictum*, found among Lord Northington's papers, coincided.

^(m) *Williams v. Goodtitle*, 5 M. & Ry. 757.

⁽ⁿ⁾ Per Sugden, C., *Crozier v. Crozier*, 3 D. & War. 365, 366; Sugd. Pow. 508,

8th ed. And distinguish the cases there cited, and *Reid v. Reid*, 25 Beav. 469, in which the remainder as well as the particular estate fails. In *Craven v. Brady*, L. R., 4 Eq. 209, 4 Ch. 296, the remainder was expressly accelerated. In that case, 4 Eq. 214, Romilly, M. R., cites as applica-

*Sometimes an estate is made to determine at the majority of a minor ; and it happens that he dies under age : whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age ; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated.

Whether, under devise to A during minority of B, A's estate determines on B's decease during minority.

In *Carter v. Church*, (*o*) A devised lands to his daughter in fee, and declared that his executors should receive the profits until she attained twenty-one, towards payment of his debts and legacies. The daughter died when five years old. The Lord Keeper was of opinion that the charging the profits until the daughter attained twenty-one, amounted to a term until she would, if living, have attained that age.

So, in *Coates v. Needham*, (*p*) where A devised lands to C and D and their heirs, upon trust, to receive the rents until his son W should attain the age of twenty-one years ; and pay one-third to the testator's wife in lieu of dower ; and out of the other two-thirds to raise portions for his daughters ; and devised all to W, when twenty-one, in tail ; and, in default of such issue, then over. W died under the age of twenty-one, without issue ; the widow afterwards died before W would, if living, have attained that age ; and it was held, [according to the first report of the case, (*q*) which is probably the correct one, (*r*) that the wife's administrator was entitled during the term for which the minority would have lasted ; but, in a subsequent case on the same will it was held] that the wife's third for such period was an interest undisposed of, and went to the testator's heir, on the ground that nothing was given to the devisees until W attained (or, rather, would have attained) his majority, and died without issue.

ble to the general question of accelerating an appointed remainder some observations of Sir E. Sugden in *Crozier v. Crozier*, which appear to refer only to the question whether, under an appointment, the failure of the particular estate involved also the failure of the remainder ; and stops just short of the passage cited above in the text.]

(*o*) 1 Ch. Cas. 113.

(*p*) 2 Vern. 65, [*Levet v. Needham*, Id. 138, which states the decision in *Coates v. Needham* wrongly.

(*q*) 2 Vern. 65.

(*r*) The decree is given in Mr. Raithby's edition from Reg. Lib., but he states that he could not find any decree in *Levet v. Needham*,] the most singular feature in which case is, the holding the interest of the wife to have ceased at her death. If, as the court assumed, a term was absolutely carved out of the inheritance, clearly words of limitation were not necessary to vest it in the wife with the transmissible quality of personal estate.

On the other hand, in *Manfield v. Dugard*,^(s) where A devised lands to his wife until B, his eldest son, should attain twenty-one; and, when he should attain that age, to him in fee, *B died at the age of thirteen; whereupon his heir-at-law claimed the rents from his death. The L. C. held, that the heir was entitled, for that the wife's estate determined at the death of the son, whose estate in fee, which was vested at the testator's death, took effect in possession on that event.

One of the reasons assigned for this adjudication was, that the land was not devised to the wife for the payment of debts; [and this agrees with *Boraston's case*]^(t) where a testator devised lands to his executors until such time as his grandson, Hugh, should accomplish his full age of twenty-one years, and the mean profits to be employed by his executors towards the performance of his will. Hugh died at the age of nine years; and it was argued by Coke, that the term of the executors did not thereby cease, because it was to be intended that the testator had computed that the profits to be taken of his lands by his executors, during the minority of his grandson, would suffice to pay his debts and perform his will, and that he did not intend that it should determine by the death of his grandson, for then his debts would remain unsatisfied and his will unperformed, which was granted by the whole court.^(u)

This argument was adopted by Sir J. Jekyll, M. R., in *Lomax v. Holmedon*,^(x) in which he distinguished the cases where such an interest was created for a particular purpose, as for a fund for payment of debts (which he said was *Boraston's case*), from the cases where no such intention appeared: in these latter he said the interest would absolutely determine by the death of the party under the age specified in the will. It is plain that here] the existence of the minority supplies the sole occasion and motive for the creation of the estate in question.^(y) [The principle of these authorities is clearly unaffected by the circumstance of the specified purpose being insufficient to exhaust the whole proceeds of the term. The construction is that the testator has made his own computation, so that the estate must endure until the

(s) 1 Eq. Cas. Ab. 195, pl. 4.

[(t) 3 Co. 19, a.

(u) 3 Co. 21, a.

(x) 3 P. W. 176. See also *Sweet v. Beal*, Lane 56, where the term was held to endure beyond the death of the minor

under age, for the termor's own benefit, which was therefore the "particular purpose" in that case.

(y) See *Castle v. Eate*, 7 Beav. 296. If the person to whom the intermediate interest is given should die during the

*regular expiration of the term, and if any part of the beneficial interest is undisposed of, it must result to the heir-at-law.]

Sometimes it happens that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would, during the minority, have devolved to the heir-at-law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately. (z)

minority, the same reasons (*i. e.*, "the existence of the minority") will give the interest to his representatives during the remainder of the term. See *Laxton v. Eedle*, 19 Beav. 321. Where it is a class during whose minority the income of property is given, the estate will continue while there is a chance of any persons becoming members of the class, though none may, for the time being, be actually in existence, *e. g.*, during the life of a parent whose children's minority is contemplated, *semb.* *Conduitt v. Soane*, 4 Jur. N. S. 502.]

(z) *Chambers v. Brailsford*, 18 Ves. 368.

[*583]

*CHAPTER XIX.

DOCTRINE OF CONSTRUCTIVE CONVERSION.

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| <p>I. <i>Money considered as Land, and vice versa. Distinction between absolute and qualified Converting Trusts.</i></p> <p>II. <i>Election to take Property in its actual State.</i></p> <p>III. <i>Effect where Legatee's Enjoyment is apparently postponed until Conversion, and, generally, as to Relative Rights of Legatee for Life and ulterior Legatee under residuary Clauses.</i></p> | <p>IV. <i>Destination of undisposed of Interests in Property directed to be converted. Doctrine of Conversion as between Claimants under Will and real and personal Representatives of Testator.</i></p> <p>V. <i>Effect of Failure by Lapse, or otherwise, of pecuniary Gifts out of Proceeds of Land.</i></p> |
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I.—On the principle that equity considers that as done which ought to have been done, it is well established that “money

Money to be laid out in land considered as land, and *vice versa*.

directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted;¹ and this in whatever manner the direction

1. See Story Eq. Jur., § 790; Wms. Ex'rs (6th Am. ed.) 729; 1 Rop. on Leg. 501; 3 Redf. on Wills 139; Theobald on Wills 95; Flood on Wills 49; Reading v. Blackwell, Baldw. C. C. 166; Peter v. Beverly, 10 Pet. 533; Craig v. Leslie, 3 Wheat. 577; Sharpley v. Townsend, 4 Harring. 336; Rawling v. Landes, 2 Bush 158; Green v. Johnson, 4 Bush 164; Clay v. Hart, 7 Dana 11; Thomas v. Wood, 1 Md. Ch. 296; Maddox v. Dent, 4 Md. Ch. 543; Leadenham v. Nicholson, 1 Harr. & G. 267; Holland v. Cruft, 3 Gray 162; Holland v. Adams, 3 Gray 188; Scudder v. Van Arsdale, 2 Beas. 109; Wurts v. Page, 4 C. E. Gr. (N. J.) 365; Meakings v. Cromwell, 5 N. Y. 136; Bramhall v. Ferris, 14 N. Y. 41; Savage v. Burnham, 17 N. Y. 561; Dodge v. Pond, 23 N. Y. 69; Horton v. McCoy, 47 N. Y. 21; Moncrief v. Ross, 50 N. Y. 431; Hatch v. Bassett, 52 N. Y. 359; Arnold v. Gilbert, 5 Barb. 190; Vail v. Vail, 7 Barb. 226; Forsyth v. Rathbone, 34 Barb. 338; Johnson v. Bennett, 39 Barb. 237; Irish v. Husted, 39 Barb. 411; Haxtun v. Corse, 2 Barb. Ch. 506; Marsh v. Wheeler, 2 Edw. 156; King v. Woodhull, 3 Edw. 79; Ross v. Roberts, 2 Hun 90; Gott v. Cook, 7 Paige 522; Bunce v. Vandergrift, 8 Paige 37; Van Veghten v. Van Veghten, 8 Paige 104; De Peyster v. Clendining, 8 Paige 295; Martin v. Sherman, 2 Sandf. Ch. 341; Shumway v.

is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land.”(a) It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character.² This doctrine is founded in justice and good sense: since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion is expressed *to be reposed. The principle is, besides, too well supported by numerous authorities,(b) to be called in question at this day.

Harmon, 6 N. Y. Sup. Ct. (T. & C.) 626; Croom v. Herring, 4 Hawkes 393; Procton v. Ferebee, 1 Ired. Eq. 143; Brothers v. Cartwright, 2 Jones Eq. 113; Conley v. Kincaid, 2 Winst. Eq. 44; Collier v. Collier, 3 Ohio St. 369; Furguson v. Stuart, 14 Ohio 140; Richey v. Johnson, 30 Ohio St. 288; Willing v. Peters, 7 Penna. St. 287; Nagle's App., 13 Penna. St. 260; Parkinson's App., 32 Penna. St. 455; Bro-lasky v. Galley, 51 Penna. St. 509; Horn-er's App., 56 Penna. St. 405; Evans' App., 63 Penna. St. 183; Dundas' App., 64 Penna. St. 325; McClure's App., 72 Penna. St. 414; Wills v. Sloyer, 1 Clark (Pa.) 516; Heberton's Estate, 3 Phila. 436; Sebastian's Estate, 4 Phila. 236; Morrow v. Brenizer, 2 Rawle 185; Simp-son v. Kelso, 8 Watts 247; Burr v. Sim, 1 Whart. 252; North v. Valk, C. W. Dud. Eq. 212; Stephenson v. Yandle, 3 Hayw. (Tenn.) 109; Postell v. Postell, 1 Desaus. 173; Rumsey v. Durham, 5 Ind. 71; Gates v. Hunter, 13 Mo. 511; McCabe v. Spruil, 1 Ded. Eq. 189; Siter v. McClanachan, 2 Gratt. 280, 294; Hurtt v. Fisher, 1 Harr. & G. 88. The interest of a devisee in land so directed to be converted cannot be sold

on execution. Baker v. Copenbarger, 15 Ill. 103.

(a) *Vide* Sir Thomas Sewell's judgment in Fletcher v. Ashburner, 1 B. C. C. 499, whose statement of the doctrine in these terms was commended for its accuracy by Lord Alvanley, in Wheldale v. Partridge, 5 Ves. 396. [As to conversion by contract, *vide ante* pp.*52, *162. None on void-able contract, as, on purchase by trustee for sale, Ingle v. Richards, 28 Beav. 361.]

2. And, *e converso*, one claiming against the will cannot avail himself of a conver-sion directed by the will for its purposes. McReynolds v. Jones, 30 Ala. 101; Barnett v. Barnett, 1 Metc. (Ky.) 254; Brink v. Layton, 2 Redf. 79; Hoover v. Landis, 76 Penna. St. 354.

(b) 2 Keb. 841; 2 Vern. 55; Pre. Ch. 543, cited 2 Vern. 58; 1 Vern. 345; 2 Vern. 20; 1 Eq. Ab. 273, pl. 5; 1 Eq. Ab. 274, pl. 6; 2 Vern. 101; Id. 295; Id. 506; 1 P. W. 172; Pre. Ch. 400; 1 Eq. Ab. 175, pl. 5; 3 P. W. 212; Cas. t. Talb. 80; 1 P. W. 204; Id. 483; 1 B. P. C. Toml. 207; 3 Id. 1; Id. 148; 2 Atk. 452; 3 Atk. 111; 3 Id. 254; 1 B. C. C. 224; 7 B. P. C. Toml. 530; 1 B. C. C. 497; Id. 505; 2 Kee. 653.

Thus, money directed to be laid out in land, and settled on A in fee, is, though not actually laid out, descendible as real estate to the heir, is subject to tenancy by the curtesy; (c) is not liable (otherwise than real estate is liable) to simple contract debts; (d) and passes under a devise of lands, tenements, and hereditaments, (e) in a will sufficiently attested to pass real estate; [and will not pass under a general bequest purporting to include personal estate only. (f)]

On the same principle, where, under the old law, a person entitled to the fee simple, in possession or reversion, of lands to be purchased, devised them by a will executed before the actual conveyance, the lands subsequently purchased were bound in equity by the devise. (g)

So, in the converse case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A, who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of personal estate. (h)

It is true that, on one occasion, (i) Lord Loughborough doubted whether, in such cases, there was any equity between the real and personal representatives; suggesting that they were rather to take according to the state in which the property was found. But this solitary *dictum* has been completely overruled by subsequent judges, who, following the earlier cases, have confirmed the rule before stated. (k)

The doctrine, of course, applies where the ultimate destination *of

(c) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 B. C. C. 404.

(d) *Lawrence v. Beverly*, 2 Keb. 841; now see ch. XLVI., § 1.

(e) *Lingen v. Sowray*, 1 P. W. 172; *Shorer v. Shorer*, 10 Mod. 39; *Harvey v. Aston*, 1 Atk. 364; *Guidot v. Guidot*, 3 Id. 254; *Rashleigh v. Master*, 1 Ves., Jr., 201, 3 B. C. C. 99; *Hickman v. Bacon*, 4 B. C. C. 333; *Green v. Stephens*, 12 Ves. 419, 17 Id. 64.

[(f) *Gillies v. Longlands*, 4 De G. & S. 372; and see *Richards v. Att.-Gen. of Jamaica*, 13 Jur. 197; *In re Pedder's Settlement*, 5 D., M. & G. 890; *In re Skeggs*, 2 D., J. & S. 533.]

(g) See Lord Cowper's judgment in *Lingen v. Sowray*, as reported 1 Eq. Cas. Ab. 175, pl. 5. Such a question can hardly arise under a will made or republished since 1837.

[(h) *Elliott v. Fisher*, 12 Sim. 505.]

(i) *Walker v. Denne*, 2 Ves., Jr., 170.

(k) *Wheldale v. Partridge*, 5 Ves. 388, 8 Ves. 227; *Thornton v. Hawley*, 10 Ves. 129; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, Id. 419, 17 Ves. 64; *Kirkman v. Miles*, 13 Ves. 338; *Triquet v. Thornton*, Id. 345; *Van v. Barnett*, 19 Ves. 102; *Ashby v. Palmer*, 1 Mer. 296, and stated *post*; *Stead v. Newdigate*, 2 Mer. 521.

the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be regarded as real estate. (*l*)

Double conversion.

[In order to work a constructive conversion, an actual sale or purchase either immediately or in future, and either absolutely or contingently at a specified time, must be directed expressly or impliedly. A direction that real estate shall not be sold, but shall be considered as personal, or *vice versa*, is insufficient, (*m*) since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But where a sale is not expressly excluded, such a direction would generally amount to a trust for sale. (*n*)

No conversion unless a sale intended.

Where a trust is in form optional to invest money, either in the purchase of fee simple lands or leaseholds, or on securities bearing interest, there will be no constructive conversion of the money into land, unless the trusts or limitations declared of the fund are such as are applicable only to fee simple property, and can be properly carried into effect only by the purchase of such property; (*o*) where the trusts are applicable solely to personalty, or may be adapted either to personalty or fee simple lands, the money will be deemed unconverted.

Effect of words giving an option as to investments.

And first as to the cases where money has been held to be converted. In *Earlom v. Saunders*, (*p*) lands were devised to trustees to the use of the testator's wife for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with remainder to two persons as tenants in common in fee; and money was bequeathed to trustees to be laid out in the purchase of lands, or any other security or securities as they should think proper and convenient; and the testator directed that the lands and securities should be made to

Cases where money has been held converted.

Earlom v. Saunders.

(*l*) *Sperling v. Toll*, 1 Ves. 70; *Pearson v. Lane*, 17 Ves. 101. [In such a case, where part of the land has been sold and the money not yet re-invested, the money will not pass under a devise of all the testator's interest in the land, if there is any part unsold to answer the description. In *re Pedder's Settlement*, 5 D., M. & G. 890.

(*m*) *Att.-Gen. v Mangles*, 5 M. & Wels. 120.

(*n*) *Tait v. Lathbury*, L. R., 1 Eq. 174; *Johnson v. Arnold*, 1 Ves. 169.

(*o*) See *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

(*p*) *Amb. 241*; see also *Johnson v. Arnold*, 1 Ves. 169; *Meure v. Meure*, 2 Atk. 265.

and settled on the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease to such uses and under such provisions, conditions and limitations as his lands before devised were limited; Lord Hardwicke, on the ground that if the money was laid out on securities which were personal, all the limitations *might not take place, considered the money to be constructively converted.

In *Cowley v. Hartstonge*, (q) the point was much considered. The trust was to lay out moneys "either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the money, &c., to H. for his life," and then followed a series of limitations of estates for life and in tail to the sons and daughters of H., and to other persons in strict settlement. It was held in D. P. that taking the whole will together, the testator contemplated *an investment in land at some time or other*, and there was therefore a constructive conversion. There was an ultimate limitation to the testator's right heirs, *executors and administrators*; but Lord Redesdale said the meaning of that was merely that if all the previous limitations failed before the death of H. there was no further cause for investing in land, and the personal estate might be left to go to the testator's next of kin, and the real estate to the heir.

In *Hereford v. Ravenhill*, (r) fee-simple estates were devised in strict settlement, and money was bequeathed upon trust with consent to be invested in the purchase of freehold, *leasehold*, or copyhold messuages, lands or hereditaments, which were to be conveyed, settled or assured to the like uses, &c., as the hereditaments thereinbefore devised stood limited. There was, also, a power to invest at interest till a purchase could be made. Lord Langdale, M. R., decided that this was a trust for conversion, and observed that the case before him differed from *Walker v. Denne* (presently noticed), in that the leaseholds to be purchased in that case were to be for very long terms of years. This difference is not very apparent; but the limitations in the several cases were such as easily to lead to different conclusions.

In *Cookson v. Reay*, (s) the testator directed a sum of money to be invested in land or other securities for his son John, the interest of such money or produce of such lands to be paid to him for his life, and if he married with consent, and made a proper

(q) 1 Dow 361.

(r) 5 Beav. 51.

(s) 5 Beav. 22.

settlement on his wife, that the remainder should go to such child or children as he might have lawfully begotten, and on failure of these to the testator's son Isaac and his heirs forever. Lord Langdale, without deciding the point, said that, upon the authorities of *Earlom v. Saunders* and *Cowley v. Hartstonge*, he was inclined to consider the money as directed to be laid out *in the purchase of land, and that the direction to invest on some other securities had reference only to the time which might elapse before a purchase of land could be procured. On appeal to D. P., (t) Lord Brougham inclined to the same opinion by reason of the words "remainder" and "heirs" in the limitations to the children and Isaac. It would seem that "heirs" alone would not have supported this conclusion. (u) However, assuming that the will had converted the money, the decision was that the beneficiaries had reconverted it. In *Simpson v. Ashworth*, (x) the testator gave to his daughter C. £4000 out of his personal estate, and directed his executors to pay her the interest of £2000 till she attained the age of twenty-one years. He also directed his executors or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed £2000, for her use and her lawful heirs, the daughter to come into possession, with the accumulations, at her age of twenty-one years. If the land was not bought before she attained that age, she was to receive the £4000, and to give security for £2000, to be returned, if she died without lawful heirs, to the testator's son and daughters that should have heirs, share and share alike, and provided the land be purchased, to be returned in the same manner. Lord Langdale held that the £2000 was intended to be converted at all events, and that the daughter took an estate tail. Applied to personal estate the gift over on the death of the daughter without heirs (*i. e.*, heirs of her body) would have been void for remoteness; which of itself, according to *Earlom v. Saunders*, was strong reason for deciding in favor of the conversion.

Simpson v. Ashworth.

Next, with respect to the cases in which it was held that there was no conversion.

Cases where money has been held not converted.

In *Curling v. May*, (y) the trust was to lay out money in the purchase of lands, or put the same out on good securities, upon trust for the separate use of H., her heirs, executors

Curling v. May.

(t) *Cookson v. Cookson*, 12 Cl. & Fin. 121. 23; *Walker v. Denne*, 2 Ves., Jr., 170.

(u) *Attwell v. Attwell*, L. R., 13 Eq. (x) 6 Beav. 412.

(y) Cited 3 Atk. 255.

and administrators. The money never having been laid out, Lord Talbot decreed the administrator of H. to be entitled.

In *Van v. Barnett*, (z) lands were devised to trustees to be sold, and the produce, with the consent of certain persons, was directed to be laid out in the purchase of *lands or in government securities*, and the latter trust was held not to operate as a re-conversion, the trusts declared of the fund in its ultimate state *not being such as to show that a re-investment in land at some time or other was intended.] (a)

In *Walker v. Denne*, (b) where money was directed to be laid out in (freehold) lands, or long terms of years, in trust for A for life, and afterwards for her children and their heirs, but if there should be no child or heirs of her body living at her death, then for the testator's right heirs, Lord Loughborough held that it was not converted into realty so as to escheat to the crown on failure of heirs, there being an option in the trustees to have it laid out in either species of property. Indeed he doubted whether, even if there had been no such option, the crown could have claimed. But

his doubt appears to have referred as well to the general doctrine, as to its effect in regard to escheat. There would seem to be considerable difficulty in supporting the claim of the crown to have the money laid out in such a case, escheat being a consequence of tenure, and, therefore (it should seem) inapplicable to equitable interests of every description. (c)

[Sometimes there is no express trust for conversion, but the accompanying directions are such as lead to an implication that conversion was intended; as, where real and personal estate was devised to trustees in trust to "invest" the same in the funds; (d) and, again, where leaseholds were given upon the same trusts and subject to the same powers as those declared of the moneys to arise by sale of property previously given in trust for sale. (e) But the same inference is not necessarily to be drawn from

(z) 19 Ves. 102.

(a) See also *Biggs v. Andrews*, 5 Sim. 424; *Rich v. Whitfield*, L. R., 2 Eq. 583, where however the point was rather assumed than decided.]

(b) 2 Ves., Jr., 170; see also *Van v. Barnett*, 19 Ves. 102.

[(c) See 3 My. & K. 494; *ante* p. *68, n. (g).

(d) *Affleck v. James*, 17 Sim. 121.

(e) *Murton v. Markby*, 18 Beav. 196. The question arose upon a claim by tenant for life to enjoy leaseholds in specie. See also *Tait v. Lathbury*, L. R., 1 Eq. 174, *ante* p. *586.

a trust to divide into several shares, even though the trustees have an express *power* of sale: (*f*) or though they are directed to “invest” some of the shares; as in *Cornick v. Pearce*, (*g*) where a testator devised all his real and personal estate to trustees upon trust to receive and apply the rents, issues and proceeds for the benefit of his two daughters until the youngest should attain the age of twenty-one, and then to divide the whole of his estate and effects into two equal moieties, one moiety to be divided between his two daughters equally, and the other moiety to be placed out by the trustees on government or real securities, the dividends and interest to be paid to the *daughters during their lives, and upon the death of the daughters, “upon trust to divide the moneys and effects amongst the children equally.” If either of the daughters should die leaving a husband surviving, the testator directed that the husband should enjoy her share for his life, and upon his decease that such share should come back to the surviving daughter, her executors, administrators and assigns. It was held by Sir J. Wigram, V. C., that there was no direction which required a conversion, except as to the moiety to be settled; as to that moiety alone was anything to be done which made a sale necessary; and the words applied only to a moiety after a division had been made. But in *Mower v. Orr*, (*h*) where a testator, after stating that his property consisted of copyholds, leasehold houses, merchandise in Australia, cash at his bankers and in the public funds, and that as it was so scattered about and not realized he could not state what he should die worth, divided it into twenty shares, sixteen of which he disposed of by giving a certain number to each of his three sons absolutely, and, as to the remaining four, he gave two to his daughter absolutely and two to be invested in the funds for the use of her children; and he appointed two of his sons executors, requesting them to get his property together and divide it according to his intention. It was held by the same judge that the testator must be understood as directing a conversion of his copyhold estate into personalty. The V. C. said that the division of the entire property into a number of shares and the directions as to the investment and disposition of some of such shares precluded the supposition that he intended the copyholds to remain unsold. In *Cornick v. Pearce* it appeared to him

*Cornick v.
Pearce.*

(*f*) *Greenway v. Greenway*, 29 L. J., Ch. 601, 605, 2 D., F. & J. 128; *Lucas v. Brandreth*, 28 Beav. 273. (g) 7 Hare 477. (h) 7 Hare 475.

the purposes of the will would, in the circumstances of that case, be effected without a conversion of the whole estate: there was a direction that the estate should be enjoyed in specie until the division, and the literal construction of the will did not require a sale of the whole estate either for the purpose of the division or the settlement of a moiety.

This distinction is not very tangible. The V. C. did not expressly advert to the testator's request "to get his property together," though in other cases much reliance has justly been placed on similar directions, coupled with an express power of sale, as indicating a desire to form the whole property into one common fund by the means pointed out, *viz.*, by sale. (i)]

*A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of real estate *instanter*, (k) this being a mere temporary arrangement; [unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final disposition of the *capital* fund, in certain events, as money, it is shown that the conversion is to take place only in the alternative events. (l)]

Direction for temporary investment does not prevent conversion.

A trust to sell within a specified period converts the property though no sale be made within the period; the specification of time being directory only. (m) In *Tily v. Smith*, (n) the testator directed that his wife should hold one of his houses for her use to bring up his children E. and M., and at their arriving to the age of twenty-one years, then all his estates real and personal to be sold and converted into money, and the proceeds to be divided between his wife and as many children as she had at his decease. The wife and M. survived the testator, but E. died in his lifetime under twenty-one, and M. afterwards died under twenty-one, so that, strictly construed, the time for conversion never arrived. However, the V. C. thought that the words "at their arriving," &c., meant only "subject thereto," or "when there shall be no child alive under twenty-one," and that in the event, which happened, of the wife

Trust to sell at a stated time.

Tily v. Smith.

(i) *Burrell v. Baskerfield*, 11 Beav. 525; *In re Cookes' Contract*, 4 Ch. D. 454.] [(l) *Wheldale v. Partridge*, 5 Ves. 388, 8 Id. 227.

(m) *Pearce v. Gardner*, 10 Hare 287;

(k) See *Edwards v. Countess of Warwick*, 2 P. W. 171. and see *Cuff v. Hall*, 1 Jur. (N. S.) 972.

(n) 1 Coll. 434.]

or one or both of the daughters surviving the testator, he intended that there should positively and absolutely at some time, and not conditionally or contingently, be a sale of the real estate. That time, he thought, arrived at or before the widow's death.

Again, it is not generally material that the sale or purchase is to be made only when the trustees think fit.³ Thus, in *Doughty v. Bull*, (o) the trust was to sell as soon as the trustees should see necessary for the benefit of the testator's children, and to apply the money for their benefit; and it was held that only the time of the sale, and not the question whether there should be any sale, was left to the discretion of the trustees.

Effect of sale
or purchase
'being only to
be made on
consent.

*Doughty v.
Bull.*

3. The general rule is, that the conversion directed by the will is considered as taking place at the testator's death, *Forsyth v. Rathbone*, 34 Barb. 388; *Stagg v. Jackson*, 1 N. Y. 206; *Cook v. Cook*, 5 C. E. Gr. (N. J.) 375; *Arnold v. Gilbert*, 5 Barb. 190; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Marsh v. Wheeler*, 2 Edw. 156; *Van Veghten v. Van Veghten*, 8 Paige 104; *De Peyster v. Clendining*, 8 Paige 295; *Brink v. Layton*, 2 Redf. 79. And where the conversion is imperatively directed, it is regarded as taking place at the time of the testator's death, although the time fixed by him for the sale for that purpose be distant, *Rinehart v. Harrison*, 1 Baldw. C. C. 177; *Fairlie v. Kline*, 2 Penn. (N. J.) 754; *High v. Worley*, 33 Ala. 196; *Hocker v. Gentry*, 3 Metc. (Ky.) 463; *Burnside v. Wall*, 9 B. Mon. 322; *Stagg v. Jackson*, 1 N. Y. 206; *Meakings v. Cromwell*, 5 N. Y. 136; *Reading v. Blackwell*, 1 Baldw. C. C. 160; *Parkinson's Appeal*, 32 Penna. St. 455; *Hebertson's Estate*, 3 Phila. 436; *McClure's Appeal*, 72 Penna. St. 414. See, however, to the effect that the conversion does not take place until the time of the sale, *Savage v. Burnham*, 17 N. Y. 561; *Moncrief v. Ross*, 50 N. Y. 431; *Manice v. Manice*, 43 N. Y. 303; *Ross v. Roberts*,

2 Hun 90; *Bunce v. Vandergrift*, 8 Paige 37; *Shumway v. Harmon*, 6 N. Y. Sup. Ct. (T. & C.) 626; *Brothers v. Cartwright*, 2 Jones' Eq. 113; *McClure's Appeal*, 72 Penna. St. 414. So, where the time of sale is left in the discretion of an executor or trustee, no conversion takes place until the sale, *Christler v. Meddis*, 6 B. Mon. 35; *Brearley v. Brearley*, 1 Stockt. 21. And in general, where the conversion is directed to take place upon a contingency, there will be no conversion until the contingency happens and the sale is made. *Peter v. Beverly*, 10 Pet. 533; *Clay v. Hart*, 7 Dana 11; *Harcum v. Hudnall*, 14 Gratt. 369. So, too, where the sale is directed to be by consent of certain persons, *Nagle's Appeal*, 13 Penna. St. 260; *Miller's Appeal*, 60 Penna. St. 404; *Evans v. Kingsbury*, 2 Rand. 120. But where the sale is to be at the election of the devisee, there will be a conversion at the time of such election, *Washington v. Abraham*, 6 Gratt. 66; and if the devisee die after election and before sale, his executor is entitled to have the sale made and to receive the money, *Ib.*

[(o) 2 P. W. 320. See also *Robinson v. Robinson*, 19 Beav. 494.

If the purchase is to be made with consent or approbation (*p*) *or on or after request or direction, the question whether or not a conversion is intended, must be answered from a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made.

Thus in *Lechmere v. Earl of Carlisle*, (*p*) L. covenanted within one year to lay out a sum of money in the purchase of lands, with the consent of trustees, and to settle them; and it was held that the money thus agreed to be laid out should be taken as land. To the objection that the trustees must previously give their consent, Sir J. Jekyll, M. R., replied, that in his opinion they were not to do the first act; L. ought to have proposed his purchase and settlement, upon which the trustees were to signify their agreement or disagreement.]

Again, in *Thornton v. Hawley*, (*q*) Sir W. Grant was of opinion, that the circumstance that a sum of stock was to be sold after request, and the produce laid out in the purchase of land at the request and with the consent of [husband and wife, or the survivor, or the executors or administrators of the survivor,] did not prevent the fund being immediately impressed with the quality of real estate, [because to such property alone were the limitations applicable, and also because it was hardly possible to suppose an intention to give an option to any person who should be an executor or administrator whether it should be money or land, though it might be intended to give that option to the husband and wife. From these considerations he inferred] that this requisition did not exclude the authority of the trustees to convert the property at their own discretion, without request; but only rendered it imperative on them to act on the request, if made. If the M. R. was right in this construction of the deed, the conclusion at which he arrived respecting the nature of the property was inevitable.

[On the other hand, in *In re Taylor's Settlement*, (*r*) houses held in

(*p*) The person whose approbation is required will not be allowed to delay the sale for his own advantage and to another's prejudice, *Lord v. Wightwick*, 4 D., M. & G. 803, 6 H. L. Cas. 217.

(*p*) 3 P. W. 211. And see *Wrightson v. Macaulay*, 4 Hare 497.]

(*q*) 10 Ves. 129; see also *Triquet v. Thornton*, 13 Ves. 345; [*Johnson v. Ar-*

nold, 1 Ves. 169.] But see Lord Eldon's judgment, in *Van v. Barnett*, 19 Ves. 102; where, however, the direction was alternative to invest in personal security or land.

[(*r*) 9 Hare 596; and see *Davies v. Goodhew*, 6 Sim. 585; *Huskisson v. Le-fevre*, 26 Beav. 157.

fee simple had been vested by marriage settlement in trustees in trust, upon request of the husband and wife, In re Taylor's Settlement. or the survivor, to sell and invest the produce of the sale, and to pay the income of the money, or of the houses till a sale, to W. for life, and after his decease, to his wife for life, and after the decease of the *survivor, to convey the houses unless sold, or to assign the money, to the issue of W. and his wife. The houses had been sold, not under the trust, but under compulsory powers in an act of parliament, which also provided that the purchase-money should be re-invested in land, to be settled to the same uses; so that the money retained the character which the houses possessed under the settlement. (s) Upon the question what that character was, Sir G. Turner, V. C., held that the settlement had not worked a conversion of the houses. He remarked that, in *Thornton v. Hawley*, the sale was, after the death of the husband and wife, to be made at the request of the executors or administrators of the survivor; but, in the case before him, the sale was to be made only on the request of the husband and wife or the survivor; so that no sale could be made after their deaths; and that words of request in cases of such nature must be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument might require. In this case, the general intent that the houses should be sold at some time or other was evidently wanting, the last proviso in the settlement directing that the property, if sold, was to be personal, if not sold, real.]

It seems that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its Effect of property directed to be sold being devised in a certain contingency as land. original state; as he may have contemplated the possibility of the contingency happening before a sale could be effected; besides which, it seems to have been considered, that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

Thus, in *Ashby v. Palmer*, (t) where a testatrix devised and be-

(s) As to this, *vide ante* pp. *162, *163.]

(t) MS.; also reported 1 Mer. 296, but with the omission of the very bequest on which the question arose, and to the particular language of which the M. R. adverted; [see also *Tily v. Smith*, 1 Coll.

434, *sup.*; *Ward v. Arch*, 15 Sim. 389; and see Lord Redesdale's remarks in *Cowley v. Hartstonge*, 1 Dow 381, cited *supra*. But the mere fact that conversion is less necessary for distribution in one alternative than in another will not prevent a

Lands devised to be sold, and proceeds given to A;

queathed her real and personal estates to trustees, upon trust, as soon as convenient after her decease, to sell, and with the money thereby raised, and the rents until the sale, to pay her and her late husband's debts, and with the surplus to educate and *bring up her daughter; and when she should attain twenty-one, or marry, "to pay the moneys which should be in the hands of the trustees, by virtue of the will, undisposed of for the uses aforesaid," to the daughter. And the testatrix went on to direct, that if the daughter died under twenty-one or unmarried, the moneys in the hands of the

--with a limitation over of the moneys, or the estate, if unsold, to B.

trustees, *and such part of the real estate (if any) as should remain unsold at the time of her decease*, and not be applied for the payment of her debts or for the education of her daughter, should go to the testatrix's sister, her heirs,

executors and assigns. The daughter attained twenty-one, but was a lunatic, and therefore incompetent to elect to take the estate as land or money. The question was, whether it went, at her death, to her heirs-at-law or next of kin. For the heir, it was contended that the estate was not to be sold at all events, but only to answer a particular purpose; that the testatrix did not mean it to go as money; *that she contemplated the possibility of its not being sold*. For the next of kin, it was argued that the estate was to be sold out and out; that the testatrix had no objection that her sister should take it as land, if by accident it should remain unsold; and she might have contemplated the premature death of the daughter before a sale could be effected; in which event, and in that only, she directs that the trustees shall not proceed in the accomplishment of her purpose. And it was contended that the words "pay to" supported this construction; and it was said that, at all events, the daughter was to take it as money. Sir W. Grant,

Held to be personal estate as to A.

M. R.: "I think that the construction of this will admits of no reasonable doubt: it is the settled rule of this court, that land once impressed with the character of money

retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character. The testatrix has directed the estate to be sold; but the question is, not whether the estate shall be actually sold or not, but whether it is to be treated as personal estate. There is no gift to the daughter in any other shape than that of money. I see nothing inconsistent in the subsequent

trust for sale from being imperative in 683. And see *Wilson v. Coles*, 6 Jur. (N. both, *Wall v. Colshead*, 2 De G. & J. S.) 1003.]

clause, by which, in the event of the death of the daughter under twenty-one, such part of the estate as should remain unsold is given to the sister. (u) She might choose to give it to the daughter as money, and to the sister as land. There is no inconsistency in saying it shall be converted *quoad* the first taker, not *quoad* the second. The cases *which have arisen between the heir and next of kin of a testator have no application to the present." (x)

And though a mere *power* of sale or purchase, of course, does not change the nature of the property; ⁴ yet the circumstance of the clause respecting the sale or purchase being framed in the language of a power will not prevent its producing a constructive conversion, if the context of the will shows

Mere power does not produce conversion unless by force of the context.

(u) As to this, see also *Crabtree v. Bramble*, 3 Atk. 680.

(x) What is the effect of a direction to purchase land in a particular parish, in which it turns out that land cannot be obtained, is not settled. Lord Thurlow thought it could not be laid out elsewhere; Lord Loughborough, that it might. Lord Eldon has alluded to these conflicting opinions without stating his own; see *Broome v. Monck*, 10 Ves. 610; also *Hayes' Introd.*, 5th ed., p. 95.

4. *Theobald on Wills* 95; *Holland v. Cruft*, 3 Gray 162; *Holland v. Adams*, 3 Gray 188; *Brearley v. Brearley*, 1 Stockt. 21; *Matter of Fox*, 52 N. Y. 530, affirming 63 Barb. 157; *Fowler v. Depau*, 26 Barb. 224; *Graham v. De Witt*, 3 Bradf. 186; *Slocum v. Slocum*, 4 Edw. 613; *McCarty v. Deming*, 4 Lans. 440; *McCarty v. Terry*, 7 Lans. 236; *Wood v. Keyes*, 8 Paige 365; *Matter of Vandervoort*, 1 Redf. 270; *Cobel v. Cobel*, 8 Penna. St. 342; *Chew v. Nicklin*, 45 Penna. St. 84; *Edwards' App.*, 47 Penna. St. 144. To effect a conversion, the direction to sell must be imperative, or the intention to convert the property must plainly appear. *Dodge v. Pond*, 23 N. Y. 69; *Moncrief v. Ross*, 50 N. Y. 431; *Vail v. Vail*, 7 Barb. 226; *Fowler v. Depau*, 26 Barb. 224; *Phelps v. Phelps*, 28 Barb. 121; *Wright v. Trustees*, Hoffm. Ch. 203; *Bleight v.*

Mf'rs Bank, 10 Penna. St. 131; *Nagle's App.*, 13 Penna. St. 260; *Stoner v. Zimmerman*, 21 Penna. St. 394; *Anewalt's App.*, 42 Penna. St. 414; *Neely v. Grant-ham*, 58 Penna. St. 433; *Miller's App.*, 60 Penna. St. 404; *Henry v. McCloskey*, 9 Watts 145; *McClure's App.*, 72 Penna. St. 414; *Story Eq. Jur.*, § 790; *Wms. Ex'rs* (6th Am. ed.) 729; 1 *Roper on Leg.* 501; 3 *Redf. on Wills* 139; *Bispham Eq.*, §§ 310, 311. In the following cases it has been held that the testator intended a conversion, and it was so decreed; "whereas no authority has been given to my executors to sell, now it is my will * * that my executors sell and dispose of all my lands and real estate not devised, * * and divide the moneys received therefrom," *Van Ness v. Jacobus*, 2 C. E. Gr. (N. J.) 153; so, a devise in trust for children, to be invested, and the shares "*to be paid*" in a certain manner, *Wurts v. Page*, 4 C. E. Gr. (N. J.) 365; to the widow for life, and at her death to be sold and divided, *Horner's App.*, 56 Penna. St. 405; *Dundas' App.*, 64 Penna. St. 325; *Allison v. Wilson*, 13 Serg. & R. 332; *Morrow v. Brenizer*, 2 Rawle 188; *Hannah v. Swarner*, 3 Watts & S. 230; *Sebastian's Est.*, 4 Phila. 236; *Stuck v. Mackey*, 4 Watts & S. 196; *Stagg v. Jackson*, 1 N. Y. 206; *Martin v. Sherman*, 2 Sandf. Ch. 341; (but

that it is meant to be imperative, or in the nature of a trust. Thus in *Grieveson v. Kirsopp*, (y) where a testator gave to his widow, for the benefit and advantage of his children, power of selling his Woodfoot estate; and by a codicil expressed himself (in effect) thus: "My mind and will is and I do empower my wife to sell all my estates whatsoever; and the money arising from such sale, together with my personal estate, she, my said wife, *shall* and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow. It was held that a trust for the children was created by the will, and that they were entitled equally. It was held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected; yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the meantime will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state.⁵ Thus, in *Polley v. Seymour*, (z) a testatrix devised the residue of her real and personal

Nature of property made to depend on trustee's option to sell or not.

see, *contra*, *Newby v. Skinner*, 1 Dev. & Bat. Eq. 488; or a power of sale to secure funds for the education of children, coupled with an interest, *Smith's Est.*, 4 Phila. 181; or to avoid an escheat, *Taylor v. Benham*, 5 How. 233. So, to "authorize and request" executor to sell has been held sufficiently imperative to cause a conversion, *Green v. Johnson*, 4 Bush 164. See, too, *Gourley v. Campbell*, 66 N. Y. 169, reversing 6 Hun 218.

(y) 2 Kee. 653; [see also *Burrell v. Baskerfield*, 11 Beav. 525; *Nickison v. Cockill*, 3 D. J. & S. 622; *In re Cookes' Contract*, 4 Ch. D. 454.]

5. Discretion, allowed as to the exercise of the power to sell, acts like a contingency, suspending the conversion until it actually takes place. *Clay v. Hart*, 7 Dana 11;

Haggard v. Rout, 6 B. Mon. 247; *Christler v. Meddis*, 6 B. Mon. 35; *Graham v. De Witt*, 3 Bradf. 186; *Cook v. Cook*, 5 C. E. Gr. (N. J.) 375; *Harris v. Clark*, 7 N. Y. 242; *Stagg v. Jackson*, 1 N. Y. 206, affirming 2 Barb. Ch. 86; *White v. Howard*, 46 N. Y. 144, affirming 52 Barb. 294; *Slocum v. Slocum*, 4 Edw. 613; *McCarty v. Deming*, 4 Lans. 440; *Matter of Vandervoort*, 1 Redf. 270; *Page's Est.*, 75 Penna. St., 87; *Twaddell's Est.*, 9 Phila. 316. See note 3, *supra*.

(z) 2 Y. & C. 708; [see also *In re Taylor's Settlement*, 9 Hare 596, *sup.*; *Harding v. Trotter*, 21 L. T. 279, V. C. S.; *Greenway v. Greenway*, 2 D. F. & J. 128; *Lucas v. Brandreth*, 28 Beav. 273; *In re Ibbetson*, L. R., 7 Eq. 229.

estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell and dispose of the whole, or such part thereof as and when he or they should *from time to time think expedient, and then, upon trust to invest the proceeds. The testatrix then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and after such sale, of the securities whereon the same should have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life annuities; and, after payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same or any part thereof should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust for five persons (including W. himself), in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof. It was held, that upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out; but that W. had a discretion to sell the whole or any part of it, when and as he might think expedient; and that, until he exercised that discretion, the property must be considered to remain in the state it was in at the time of the death of the testatrix.

[So in *Yates v. Yates*, (b) where a testator devised lands to trustees in trust for his wife during her life, with remainders over; and for carrying into effect the purposes of his will, he “authorized his trustees at such time or times as they should think proper, in case they should think it necessary so to do, but as to which they should have absolute discretion” to sell the lands or any part thereof: the land in question was nearly unproductive in its actual state, but was valuable for building purposes; it had not yet been sold by the trustees; and the widow, the tenant for life, claimed interest at £4 per cent. upon the value of the land from the death of the testator: but Sir J. Romilly, M. R., held that she was not entitled to this, the trustees having a discretionary *power* to sell when they thought fit. If there had been an absolute trust for conversion, though the time for exer-

[(b) 28 Beav. 637.]

cising it had been left to the discretion of the trustees, the case would have been different.]

The question whether real estate is absolutely converted by a direction or authority has often come under consideration on the claim of the crown to legacy duty under the general stamp act, (55 Geo. III., c. 184, sched. part 3) which subjects to the duty *"moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged or otherwise disposed of." On this subject, the following points have been decided:—

Legacy duty on proceeds of real estate, often raises question whether conversion is absolute.

1st, Where real estate is directed to be sold out and out, the duty attaches, though by reason of the legatee electing to take it as real estate the property is not actually sold. (c)

Rule on this subject.

2ndly, Where the trustees have an option to continue the property in its actual state or to sell [for the purpose of distributing the proceeds according to the will, and in the exercise of this discretion they sell, the legacy duty attaches: (d) but not if they do not sell. (e) If the power of sale is given only for the purpose of re-investment in land, (f) or for the variation of securities, (g) or (it seems) for the purpose of raising debts and legacies or other prior charges, (h) the duty is not payable, whether the property is sold or not, and although, after a sale, the beneficial owners have elected to take the property as money. (i)

3rdly, Where a sale is directed by the court in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are compelled by the court to exercise, but not (k) if the court acts upon its general jurisdiction in such cases.]

And it is to be observed, that where trustees are authorized to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the

Mere power of sale does not let in legacy duty.

(c) *Att.-Gen. v. Holford*, 1 Pri. 426; *Adv.-Gen. v. Ramsay's Trustees*, 2 C., M. & R. 224, n.; [*Williamson v. Adv.-Gen.* 10 Cl. & Fin. 1.

(d) *Att.-Gen. v. Simcox*, 1 Ex. 749.]

(e) *Att.-Gen. v. Mangles*, 5 M. & W. 120; [*Att.-Gen. v. Simcox*, 1 Ex. 749

(f) *Mules v. Jennings*, 8 Ex. 830.

(g) *In re Evans*, 2 C., M. & R. 206; *Adv.-Gen. v. Smith*, 1 Macq. Sc. Ap. 760.

(h) Per Lord Cranworth, *Adv.-Gen. v. Smith*, *sup.*

(i) *Mules v. Jennings*, *sup.*

(k) *Hobson v. Neale*, 8 Ex. 368, 17 Beav. 178; *Harding v. Harding*, 2 Gif. 597.]

property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration. (l)

(l) *Att.-Gen. v. Mangles*, 5 M. & Wel. 120. [**Legacy Duty on Proceeds of Conversion.**—Reference may here be made to some of the authorities on legacy duty. An annuity charged on land is liable to duty, and so is a rent charge limited under a power in a will, whether the power is to be exercised by deed or will, and whether it be general or in favor of particular objects (*Att.-Gen. v. Pickard*, 3 M. & Wel. 552, 6 Id. 348; *Sweeting v. Sweeting*, 1 Drew. 336); and it is immaterial that the appointee is put to an election, as in case of a wife, between the rentcharge and her dower (*Att.-Gen. v. Henniker*, 7 Exch. 331; *Sweeting v. Sweeting*, *supra.*) On the other hand, where the power is given by deed to charge or appoint out of land “a specific sum,” whether generally or in favor of particular objects, duty does not attach (*Att.-Gen. v. Hertford*, 14 M. & Wel. 284;) but the duty does attach on a sum of money not charged on land, appointed under a general power given by deed (In *re Cholmondeley*, 1 Cr. & Mees. 149); and money given by will, under a general power to appoint contained in a previous will, pays double duty, that is to say, under the first will as if it had been an absolute legacy to the donee of the power, and under the second will as if it had been an ordinary legacy out of the estate of such donee; but before 23 and 24 Vict., c. 15, § 4 (*ante* p. *3, n.,) probate duty was payable only under the first will, (*Platt v. Routh*, 6 M. & Wel. 756, 3 Beav. 257, 10 Cl. & Fin. 257.) The last case also decides that a power to appoint to any one except specified individuals, must, at all events, so far as regards the legacy duty acts, be considered as a general power of appointment. Nothing but what is generally a charge in favor of one person on the estate of another is

within the act, (*Shirley v. Ferrers*, 1 Phill. 167.) But a charge originally in favor of a third person, but which by *subsequent circumstances only*, has become a charge in favor of the owner of the estate, is within the act, (*Att.-Gen. v. Metcalfe*, 6 Exch. 26; and see *Swabey v. Swabey*, 15 Sim. 502; In *re Taylor*, 8 Exch. 384.) As to money bequeathed to be laid out in land, see In *re De Lancey*, L. R., 5 Ex. 102, 7 Ex. 140. The importance of these cases, and of those referred to in the text, is much diminished by the act 16 and 17 Vict., c. 51, imposing succession duty on real estate. The amount payable, however, and the mode of payment, are sometimes different, according as it is legacy or succession duty which attaches; and the latter is a charge on the property, while the former is not.

Probate Duty on Proceeds of Land.

—Probate duty is payable on whatever the executor recovers *virtute officii*; it is therefore payable on the purchase money of land contracted to be sold, though the purchase is not completed until after the death of the vendor, (*Att.-Gen. v. Brunning*, 8 H. L. Cas. 243;) and on a share of the proceeds of real estate which at the time of the testator's or intestate's death has either by express trust (*Att.-Gen. v. Lomas*, L. R., 9 Ex. 29) or by construction of equity—as in the case of a share of partnership realty (per James, V. C., *Forbes v. Stevens*, L. R., 10 Eq. 178)—been impressed with the character of personalty, though not actually sold. It is otherwise where the conversion is effected by, or is dependent on, the will of the deceased person, and where, consequently, the conversion takes effect only from and after his death, (*Matson v. Swift*, 8 Beav. 369; *Custance v. Bradshaw*, 4 Hare 315, explained 8 H. L. Cas. 260.)]

*II.—But although a new character may have been in plain and

Person absolutely entitled, may elect to take property in its actual state.

unequivocal terms impressed upon property by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its

conversion *de facto*, elect to take the property in its actual state.⁶

And then comes the inquiry, Who are personally competent to make,

Who competent to make election.

and what amounts to such an election? It is clear that an infant, (*m*) or lunatic, (*n*) is incompetent, and also a *feme covert*, (*o*) unless under a power or trust authorizing

her to deal with the property as a *feme sole*. (*p*) It was said by Lord

Parol election, whether good.

Macclesfield in *Edwards v. Countess of Warwick*, (*q*) that the election might be made by parol. Lord Hardwicke,

in *Bradish v. Gee*, (*r*) said that he could not admit this proposition; but the affirmative appears to have been decided at the Rolls, (*s*) in *Chaloner v. Butcher*.

The expressions or acts declaratory of such an intention, however,

What amounts to an election.

[though it is said they may be slight, (*t*)] must be unequivocal. (*u*) Thus, where (*v*) a person was, under a

settlement, tenant in tail of lands, with a reversion in fee to himself, and was entitled under the same settlement to lands to be

6. *Laird's Appeal*, 85 Penna. St. 329; *Rawling v. Landes*, 2 Bush 158; *Holt v. Lamb*, 17 Ohio St. 374; *Ross v. Drake*, 37 Penna. St. 373; *Hannah v. Swarner*, 3 Watts & S. 230; 2 Story Eq., § 793; *Swan v. Goodwin*, 2 Duv. 298; *Wills v. Sloyer*, 1 Clark (Pa.) 516; *Stuck v. Mackey*, 4 Watts & S. 196; *Burr v. Sim*, 1 Whart. 265; *Smith v. Starr*, 3 Whart. 62; *Baker v. Copenbarger*, 15 Ill. 103; *Tazwell v. Smith*, 1 Rand. 313; *Mandlebaum v. McDonell*, 29 Mich. 78; *Harcum v. Hudnall*, 14 Gratt. 369. But all the devisees must concur in such election, *Baker v. Copenbarger*, *ubi supra*; *Harcum v. Hudnall*, *ubi supra*. But see *contra*, *Mandlebaum v. McDonell*, *ubi supra*. This right of election is personal as in other cases of election; see ch. XIV.; *High v. Worley*, 33 Ala. 196; and when exercised the devisee electing to take the land takes it as unconverted, *Samuel v. Samuel*, 4 B. Mon. 245. But renting out of the lands by one devisee,

before the happening of the contingency upon which the conversion is to take place, and taking the rents is not sufficient evidence of such election, *Harcum v. Hudnall*, *ubi supra*.

(*m*) *Carr v. Ellison*, 2 B. C. C. 56; *Van v. Barnett*, 19 Ves. 102. [Except under the direction of the court, *Robinson v. Robinson*, 19 Beav. 494.]

(*n*) *Ashby v. Palmer*, 1 Mer. 296.

(*o*) *Oldham v. Hughes*, 2 Atk. 452; [*Sisson v. Giles*, 3 D., J. & S. 314.]

(*p*) *In re Davidson*, 11 Ch. D. 341.]

(*q*) 2 P. W. 173.

(*r*) *Amb.* 229.

(*s*) 8 March, 1736, cited 3 Atk. 685.

[(*t*) *Per Lord Eldon*, 8 Ves. 236.]

(*u*) *Stead v. Newdigate*, 2 Mer. 531; [*In re-Pedder's Settlement*, 5 D., M. & G. 890.]

(*v*) *Edwards v. Countess of Warwick*, 2 P. W. 171, 2 Eq. Cas. Ab. 42, pl. 3, 1 B. P. C. Toml. 207; [and see *Biddulph v.*

purchased with a certain sum of money and settled to the same uses ; it was held, that his levying a fine of the land limited by the settlement, to bar the issue, did not demonstrate an intention to take as money the fund not laid out. (*x*)

And where a person, entitled to the fee simple in lands to be purchased with trust-money, called in [part of] the money, and placed it out upon a fresh security, in the name of a trustee for himself, his executors and administrators, it was held that he had by these acts elected to take [that part] as money, (*y*) [but that the rest of the money, whether subsisting upon the securities upon which it was originally placed or any other securities where no new trusts had been declared, ought to be considered as real estate.]

But, where (*z*) the legatee of the proceeds of an estate directed to be sold, entered upon the whole estate and made a lease of part of it, reserving rent to her heirs and assigns, she was held to have elected to take it as land. [And letting to a new tenant from year to year has been held to bring the case within the same principle, on the ground that if the tenant were lawfully evicted by a purchaser under the trust for sale, the lessor would be liable to an action by the tenant. (*a*)

Taking, and for nine years retaining, possession of the estate directed to be sold, have been held sufficient of themselves to prove an intention to re-convert. (*b*) But possession for two or three years by tenants in common (without more) has been held insufficient. (*c*) The circumstance that, where several are entitled in common, a sale is required for convenient division of the property, would seem to diminish the probability of their intending to put an end to the trust. But where two tenants in common had been in possession for seven years, and it was clearly shown that one of them, who was also the principal acting trustee, desired to retain the estate for building purposes, slight evidence of the con-

Changing the securities.

Demising the property.

Taking possession of it—length of possession.

Biddulph, 12 Ves. 161 ; *Dixon v. Gayfere*, 17 Beav. 433 ; *Griesbach v. Fremantle*, 17 Beav. 314 ; *Meredith v. Vick*, 23 Beav. 559.]

(*x*) As to barring entails in lands to be purchased, see stat. 3 and 4 Wil. IV., c. 74, §§ 70, 71 ; and 1 Hayes' *Introd.*, (5th ed.) p. 204.

(*y*) *Lingen v. Sowray*, 1 P. W. 172,

Pre. Ch. 400, 1 Eq. Cas. Ab. 175, pl. 5.

(*z*) *Crestree v. Bramble*, 3 Atk. 680 ; [and see *Mutlow v. Bigg*, 1 Ch. D. 385.

(*a*) In re *Gordon*, 6 Ch. D. 531. But see *Meek v. Devenish*, Id. 573.

(*b*) In re *Gordon*, *sup.*

(*c*) *Kirkman v. Miles*, 13 Ves. 338 ; *Brown v. Brown*, 33 Beav. 399.

currence of the other satisfied the court that the latter also had elected to keep the estate unsold. (*d*)

Again, in *Davies v. Ashford*, (*e*) where a person made inquiry as to his interest in lands held upon trust for sale, and on finding that he was absolutely entitled to the money to arise from the sale, took the title deeds into his own possession (from whom or by what means he obtained them being held immaterial,) it was held that there was sufficient evidence of his election that the land should not be converted.

A specific devise, to the ordinary uses of a strict settlement of real estate, of the land directed to be sold, is clear evidence of an intention to retain it unsold.] (*f*) And where (*g*) a person entitled to the absolute reversion in a fund of this description, [who described himself in a memorandum at the foot of an account of the property as being entitled to the *fund* as residuary *legatee* of the last owner, which he was,] made his will, in which, after devising certain real estate, he bequeathed the residue of his personal estate in possession or reversion, Sir W. Grant decided, that as the testator [had so described himself, and] had no other reversionary interest to which this expression could be applied, it amounted to a demonstration of intention to bequeath this fund as personal estate. There seems, however, to be some difficulty in drawing any such inference from the inaptitude of the terms of the bequest to any other *existing* property of the testator at the date of the will, seeing that a residuary disposition of this nature comprises after-acquired personalty. (*h*)

(*d*) In re Davidson, 11 Ch. D. 341.

(*e*) 15 Sim. 42.

(*f*) Meek v. Devenish, 6 Ch. D. 566.]

(*g*) Triquet v. Thornton, 13 Ves. 345; [compare In re Skeggs, 2 D., J. & S. 533.]

(*h*) Where person bound to lay out money in land becomes entitled to it.—

It seems, that where a person covenants to purchase land, and eventually himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for, the money centre in the same person; the covenant is, without any act on his part, considered as discharged. As in *Chichester v. Bickerstaff*, 2 Vern. 295, where A on his marriage covenanted to

lay out a sum of money in the purchase of land, to be settled to the use of himself for life; remainder to his intended wife for life; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to his own right heirs. A did not lay out the money, and survived his wife, who died without issue; and it was decided, that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations; and was therefore, at the death of the settlor, his personal estate. This decision, indeed, was ques-

*[Again, in *Cookson v. Reay*, (i) where a sum of money subject to a trust for investment in land, which ultimately became liable to be settled upon one for life, with remainder to another in fee, was, by those two persons in a deed appointing new trustees, spoken of as moneys which they were then entitled to receive, and trusts for investment in *securities* were declared, it was held that there was sufficient evidence that they had elected that the money should not be converted, and this, although the trusts of the moneys and securities were declared by reference to a prior settlement, the trusts of which were also declared by reference to a former will, under which will it was assumed for the purpose of the decision that the money was constructively converted; this reference was held not sufficient to outweigh the direct words contained in the deed of appointment, as to the parties being entitled to the receipt of the money.]

In *Harcourt v. Seymour* (k) there were several circumstances, from which, taken together, election was presumed; the principal one seems to have been, that the sum of money in question, which was subject to a trust for investment in land, (to which, when purchased, the testator would have been entitled in fee, subject only to a provision for his wife in bar of dower,) was included in a statement of the testator's personal property found among his papers after his death.]

Harcourt v.
Seymour.

And here it may be observed, that in order to amount to an election to take property in its actual, as distinguished from its eventual, or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprie-

All persons interested must concur in act of election.

tioned by Lord Talbot, in *Lechmere v. Lechmere*, Cas. t. Talb. 90; and by Sir J. Jekyll, in *Lechmere v. Earl of Carlisle*, 3 P. W. 221; but Lord Thurlow, in the great case of *Pulteney v. Darlington*, 1 B. C. C. 238, 7 B. P. C. Toml. 530,* expressed a strong opinion that it was right; which case went, Lord Eldon has said, to this: "that if the property was at home, in the possession of the person under

whom they claimed as heir and executor, the heir could not take it;" and his lordship observed, the question, then, was not upon the equity between the heir and the executor, but whether the property was at home.

[(i) 5 Beav. 22, *nom.* *Cookson v. Cookson*, 12 Cl. & Fin. 125.

(k) 2 Sim. (N. S.) 12.]

* The able and elaborate arguments of Sir John Scott (afterwards Lord Eldon,) and Mr. Fearn, the counsel for the ap-

pellants, display the deepest research into the subject, but they did not succeed in overturning the decree.

tor to change its character, in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator.⁷ Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A, B and C, in equal shares, and after the death of the testator, and before the sale is effected, A grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then *dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares, the converting trust having been created for the benefit of all. (l)

[But if the whole of the proceeds are given to A on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency to re-convert the land, if no sale has been (as, of course it may nevertheless have been) previously made. (m) And of course, if money be directed to be laid out in land for the benefit of A, B and C as tenants in common in fee, any one or more of them may take their shares of the money without the consent of the rest. "For," said Lord Cowper, "it is in vain to lay out this money in land for B and C, when the next moment they may turn it into money, and equity, like nature, will do nothing in vain." (n)]

And although it is not in the power of the owner of an undivided

7. *Baker v. Copenbarger*, 15 Ill. 103; *Harcum v. Hudnall*, 14 Gratt. 369. But see *Mandlebaum v. McDonell*, 29 Mich. 78.

[(l) See 1 B. C. C. 500; *Elliott v. Fisher*, 12 Sim. 505; *Holloway v. Radcliffe*, 23 Beav. 163, 11 Ch. D. 348. But this rule would not apply where the trust for sale of land was for the purpose of paying debts, legacies, &c.; the devisee (or legatee of the surplus proceeds) subject to the charges, might himself clear them off and retain the land unsold, *Griesbach v. Freemantle*, 17 Beav. 314. So if the

legatees, though not paid, acquiesced in the retention, *Mutlow v. Bigg*, 1 Ch. D. 385. And after lapse of time and where no prejudice accrues to them their acquiescence will be easily inferred, *Ib.*

(m) *Meek v. Devenish*, 6 Ch. D. 566, explaining *Sisson v. Giles*, 3 D., J. & S. 614.

(n) *Seeley v. Jago*, 1 P. W. 389. And a small sum (A's share) might be as advantageously laid out in land for A as a large sum (the entire fund) for A, B and C.]

share, or any other partial interest in land which is directed to be converted, by his single act to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear, that if a person entitled to a reversionary interest in money to be laid out in land, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition ; (o) though, on the death of the donee intestate, it would devolve on *his* real representative. So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee. (p)

Dispositions by partial owner before actual conversion.

[Where property subject to a trust for conversion was settled by the owner on her marriage, and a power to re-convert (or retain *the property in its actual state) was reserved to the trustees, to be exercised with the consent of the tenants for life or the survivor, it was held by Sir W. P. Wood, V. C., that the power ceased as soon as the property had vested absolutely in the children, although one of the tenants for life was still living.] (q)

Delegation of power by beneficiary.

And here it may be observed, that where (r) real estate was devised upon trust for sale, and the proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein ; it was held, that the wife was by this means barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced by the husband and wife conveying the property by a deed acknow-

Husband and wife may convey land directed to be sold as real estate.

(o) *Triquet v. Thornton*, 13 Ves. 345.

(p) See *Hewitt v. Wright*, 1 B. C. C. 86.

(q) *Doncaster v. Doncaster*, 3 K. & J. 26. And see *Rich v. Whitfield*, L. R., 2 F. 7. 583.]

(r) *May v. Roper*, 4 Sim. 360. This doctrine is often found very convenient in practice, where a married woman has a reversionary interest in a fund of this description ; which, in its character of personalty, she is incompetent to deal with, so as to bar her contingent right by

survivorship, but which may be effected by means of a deed (duly acknowledged as to the wife) assigning the property. [*Briggs v. Chamberlain*, 11 Hare 69, overruling *Hobby v. Allen*, 15 Jur. 835, 20 L. J., Ch. 199, 4 De G. & S. 289 ; and see *Tuer v. Turner*, 20 Beav. 560 ; *Franks v. Bollans*, L. R., 3 Ch. 717. The act 20 and 21 Vict., c. 57, enabling married women thenceforth to dispose of their reversionary interests in personalty, does not extend to interests under marriage settlements.]

ledged by her, according to the statute of 3 and 4 Wil. IV., c. 74, §§ 77, 79.

III.—Sometimes, the exercise of trustees' option to convert regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; *i. e.* until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail, in spite of any suspicion that the testator misapprehended the effect of the term he has employed.

As in *Brown v. Bigg*, (s) where a testator ordered and empowered his wife (in case she chose so to do) with the advice of W. G., to sell all his G. estates, (stating that she would probably not choose to live there,) with the crop, stock, and effects, with all convenient speed; and the money arising from such sale, to be placed out on security, the yearly interest of which, as well as the interest due to the testator on notes, bonds, mortgages or otherwise (except what was in the public funds,) he gave to his wife for life, determinable as to one moiety on marriage again. *And after giving several legacies, the testator after his wife's death left the whole of his personal estate, principal and interest, of every kind, both on public and private security, before undisposed of, to several persons. The wife sold part of the G. estate, and died; and Sir W. Grant, M. R., held, that the proceeds of such part belonged to the residuary legatees, and that the unsold part of the estate remained the property of the testator's heir.

So, if the fund arising from the sale be disposed of in such terms as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

Thus, where (t) a testator devised certain real estates to his wife for life, and directed that A should, as soon after her decease, or her refusing to release her dower, as conveniently might be, sell the estate; and as to the moneys arising from the sale, together with the rents till sold, he gave the same to be equally divided between his five nephews

(s) 7 Ves. 279; [and see *Harding v. Trotter*, 21 L. T. 279, V. C. S.] also *Faulkner v. Hollingsworth*, cit. 8 Ves. 558.

(t) *Elwin v. Elwin*, 8 Ves. 547. See

(naming them), at such time as the sale should be completed, *in case they should be then living*; but, in case any of them should die in his lifetime, or before the sale of his said estate should be completed, leaving issue, his part should be paid to his children; but in case any of them should die in his lifetime, or before the sale should be completed, without leaving issue, to the survivors. Sir W. Grant held, that the share of a nephew surviving the testator, but dying before the sale, did not vest; observing, that to adopt the contrary construction would deny to the testator the power, by any express form of words, or clear manifestation of intention, to make the vesting depend on the actual sale.

In all such cases, however, the courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to are those in which a will, creating a trust for conversion, is so framed as that the enjoyment of the *cestui que trust* is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposable that the *testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place. Thus, where (u) lands were conveyed upon trust to be sold, and out of the money arising from the sale other lands were to be purchased, to be settled to certain uses, and a person, who would have been tenant in tail under those uses with reversion in fee to himself, levied a fine of the estate conveyed to be sold; Sir W. Grant held, that though no estate was in terms limited to him in that property, yet he was tenant in tail in equity; and, by the fine, acquired an equitable fee. [So, where by

Doctrine as to enjoyment of property which is subject to a trust for conversion.

(u) *Pearson v. Lane*, 17 Ves. 101.

will trustees were directed to sell an advowson when full, and invest the proceeds for the benefit of A during her life, and afterwards for other persons, a sale of the advowson not having been effected while the advowson was full, it was held that the right to nominate a clerk was in A.] (x)

But though the general principle is well settled, yet many questions have arisen in the course of its application, especially respecting the precise point of time at which the enjoyment of the legatee for life commences; the effect of an express direction to accumulate the income until conversion; and, above all, as to whether the legatee for life of the proceeds is, until the conversion of the property, to take the actual income, or the assumed income; in other words, whether he is entitled to the income accruing from the property in its actual condition, or the income which, if duly converted and invested, it would have yielded.

Points of this nature have most commonly occurred under general residuary clauses containing trusts for sale and conversion, in which the principle has to be applied to the various species of property of which a residue is composed.

Rules deduced from cases.

The following positions will be found to embody the chief doctrines to be deduced from the authorities:—

1. In the ordinary case of residuary personal estate being directed to be sold or otherwise converted into money, and the *produce (either with or without a prior express trust for payment of debts and legacies) laid out in government or real securities for the benefit of a person for life, at whose decease the capital is given over, without any express appropriation of the income accruing before conversion, the income arising from such part of the residue as, at the testator's decease, was actually invested in government or real securities, [or other] securities of the nature contemplated by the investment trust, belongs to the residuary legatee for life from the period of the testator's decease. (y)

[(x) *Briggs v. Sharp*, L. R., 20 Eq. 317. And see *Hawkins v. Chappel*, 1 Atk. 621; *Johnstone v. Baber*, 6 D., M. & G. 439; *O'Shea v. Howley*, 1 J. & Lat. 391.]

(y) *Hewitt v. Morris*, T. & R. 241; *Angerstein v. Martin*, Id. 232; *Dimes v. Scott*, 4 Russ. 209; *La Terriere v. Bulmer*, 2 Sim. 18; *Douglas v. Congreve*, 1

Kee, 410; [*Taylor v. Clark*, 1 Hare 161; *Macpherson v. Macpherson*, 16 Jur. 847, 1 Macq. H. L. 243; *Hume v. Richardson*, 4 D., F. & J. 29; *Brown v. Gellatly*, L. R., 2 Ch. 751. But income arising within the first year from so much of the testator's estate, (say consols) as is required for payment of debts and legacies,

2. In the case already described, namely, that of a residuary bequest containing a trust for sale and conversion, without any express appropriation of the annual income until conversion, the destination of such income arising within the first year from the unconverted property (comprising all which does not consist of such investments as the proceeds are directed to be converted into) was long doubtful. In *La Terriere v. Bulmer*, (z) Sir A. Hart, V. C., decided that the first year's income formed part of the capital. In *Dimes v. Scott*, (a) Lord Lyndhurst held the legatee for life to be entitled during the year, in lieu of the actual income, to dividends on so much three per cent. stock as the proceeds of the property, if converted, would have purchased at the end of the year. In *Douglas v. Congreve*, (b) Lord Langdale, M. R., (after noticing these conflicting opinions,) gave the legatee for life the actual income arising from unconverted funds, from the testator's death until the end of the year, or until conversion, which should first happen; (c) a rule which certainly seems to be more just than the first, and more convenient than the second, of the others which have been referred to, [and was *apparently adhered to by the same judge in *Mehrtens v. Andrews*. (d)] However, the rule laid down in *Dimes v. Scott* has since been repeatedly followed, and must be considered as now settled.] (e) The ground, however, for the construction which gives the income to the legatee for life of the proceeds from the testator's death, is strengthened, where he has bequeathed out of the fund pecuniary legacies, which are

is not income arising from residue; it falls into and increases the capital of the residue, *Holgate v. Jennings*, 24 Beav. 623. In other words, there is no residue till those payments have been made, and tenant for life must keep down the interest of debts as well during the first as during subsequent years, *Allhusen v. Whittell*, L. R., 4 Eq. 295; *Marshall v. Crowther*, 2 Ch. D. 199, (real estate) and cases there cited. *Griesley v. Earl of Chesterfield*, 13 Beav. 288, therefore does not furnish a general rule. The income of a fund set apart to answer a contingent claim, arising until the contingency happens or becomes impossible, is income, not capital, *Allhusen v. Whittell*, *sup.* and cases there cited. But see *Tucker v. Bos-*

well, 5 Beav. 607.]

(z) 2 Sim. 18.

(a) 4 Russ. 195.

(b) 1 Kee. 427.

(c) See *Angerstein v. Martin*, T. & R. 232, [acc. But Lord St. Leonards has said (16 Jur. 847, 1 Macq. H. L. Cas. 243,) that when Lord Eldon there decreed the dividends on Russia stock to the tenant for life his attention could not have been called to the point. See also per K. Bruce, V. C., 1 Y. & C. C. C. 318.

(d) 3 Beav. 72.

(e) *Taylor v. Clark*, 1 Hare 161; *Morgan v. Morgan*, 14 Beav. 77; *Brown v. Gellatly*, L. R., 2 Ch. 751; *Allhusen v. Whittell*, L. R., 4 Eq. 295.]

expressly made to carry interest from that period; (*f*) and it should seem that such is the invariable rule, where the subject of disposition is a specific property, and the execution of the trust for conversion is not involved in the administration of the general personal estate; in which case (there being no analogy to the case of general pecuniary legacies which are payable at the end of a year) the legatee of the dividends or interest would be entitled to the rents from the period of the testator's death. (*g*) [Where the words of the will are sufficiently clear upon the point, the tenant for life will of course be entitled to the income of the property in specie until conversion, however long that may be deferred. (*h*) The question what words are sufficient for this purpose will be discussed presently.]

3. The rule that a conversion is to be deemed as having been made within a year from the testator's death, is applied in favor of, as well as against, the tenant for life. Thus,] where trustees are directed to convert property, (whether it be land into money, or money into land,) *and until conversion the income is directed to be accumulated* and added to the capital; and it happens that the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year; this being considered to afford a reasonable time for the conversion of the property; (*i*) and it is immaterial, in such case, that the clause directing the accumulation of the immediate income goes on to provide for its investment. (*k*) And it is to be observed, that where the purchase of land is to be made with a pecuniary legacy, which is to come out of the testator's general estate, (and payment of which, therefore, may, under the general rule, be made at any time within a year,) the twelve

Effect of direction to accumulate until conversion.

(*f*) *Fitzgerald v. Jervoise*, 5 Mad. 25. The marginal abstract of this case is very inaccurate.

(*g*) See *Hutcheon v. Mannington*, 1 Ves., Jr., 366; *Sitwell v. Bernard*, 6 Ves. 541.]

[(*h*) *Sparling v. Parker*, 9 Beav. 524; *Mackie v. Mackie*, 5 Hare 70; *Wrey v. Smith*, 14 Sim. 202; *Johnston v. Moore*, 27 L. J., Ch. 453; *Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Stroud v. Gwyer*, 28 Beav. 130; *Straker v. Wilson*, L. R., 6 Ch. 503. In the last two cases executors had power to determine how much of trade profits should go as income and how

much as capital.]

(*i*) *Sitwell v. Bernard*, 6 Ves. 520, and cases there cited; *Kilvington v. Gray*, 2 S. & St. 396; *Noel v. Henley*, 7 Pri. 241; [*Stair v. McGill*, 1 Bli. (N. S.) 662;] *Vickers v. Scott*, 3 My. & K. 500; [*Tucker v. Boswell*, 5 Beav. 607; see also *Vigor v. Harwood*, 12 Sim. 172, where an implied direction to accumulate was altogether disregarded, so that the tenant for life got the income from the testator's death.]

(*k*) *Entwistle v. Markland*, 6 Ves. 528, n.

months, at which the income becomes receivable by the tenant for life, is computed from the time of the receipt of the legacy. (l)

4. With respect to such portion of the property as is, in point of fact, converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not. (m)

As to income of property converted within the year.

5. If the property [*can be*, but] is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result, if the conversion had taken place at such year's end, and the proceeds had been then invested in three per cent. stock; the dividends of which stock will form the income to which the legatee for life will be entitled either from the testator's decease, or from the end of the year, according to the fact, whether there is not, or is, an intermediate trust for accumulation. (n) And this rule applies as well where the unconverted fund or property is of a permanent nature, as where it is limited in its duration, as leaseholds, &c. (o) [It *also applies *in favor* of the tenant

As to income of property which can be but is not converted within the year.

(l) Parry v. Warrington, 6 Mad. 154.

(m) La Terriere v. Bulmer, 2 Sim. 18; see also Dimes v. Scott, 4 Russ. 209; Gibson v. Bott, 7 Ves. 89.

(n) But the stock might happen to be lower at the actual investment at the year's end; and then it should seem, a portion of the income would be undisposed of during the life.

(o) See Dimes v. Scott, 4 Russ. 209; Mills v. Mills, 7 Sim. 501; [Mehrtens v. Andrews, 3 Beav. 72; Hume v. Richardson, 4 D., F. & J. 29; Brown v. Gellatly, L. R., 2 Ch. 751.] In Dimes v. Scott, a testator bequeathed the residue of his personal estate to trustees, upon trust, to convert the same into money, and there-out to pay debts, and invest the surplus in *government or real security*, for the benefit of A for life; at whose decease the capital was given to other persons absolutely. When the testator died, part of his property was invested in an East

India security yielding £10 per cent., on which the executors permitted it to remain for several years, and during this period paid over the whole interest to the legatee for life; Lord Lyndhurst decided, that they could only be allowed, as a proper application of income, a sum equal to the dividend on so much three per cent. consols as the proceeds of the security, if turned into money, at the end of a year from the testator's decease, would have purchased; such dividends to be computed from the decease of the testator; and though it appeared that the fund had actually yielded more than it would have produced if sold at the end of a year, yet the trustees were held not to be entitled to the benefit of this gain, by way of set-off against the claim of the ulterior legatees for excess of income paid to the legatee for life; but were bound to account for both such excess, and also the entire sum actually received on the con-

for life to moneys recovered after a long interval, and to reversionary interests from which he might derive no benefit, precisely as it is applied against him to property of a wasting nature, from which he would derive more than his proper share of income; (*p*) and the value of such interests is to be calculated, not at what they would sell for at the testator's death, but on their falling into possession it is to be ascertained what would have been the value at the end of a year from the testator's death of a sum of money which, as the event has turned

version of the security. [In *Robinson v. Robinson*, 1 D., M. & G. 247, where trustees had an option to invest in government or real securities, and had neglected to convert improper investments and a loss had ensued, they were charged, not with so much government stock (for they were not bound to choose that mode of investment,) but with the money value of the fund at the year's end, and £4 per cent. interest on such value; and it was held to follow that the income of the tenant for life who had acquiesced in the default must also be £4 per cent. on the same value. But where the only question is what are the relative rights of tenant for life and remainderman in an improper investment forming part of the testator's estate, the rule in *Dimes v. Scott* and *Taylor v. Clark* applies, and whether the will does or does not give an option to invest in government or other securities, the tenant for life is entitled only to dividends on so much consols, *Brown v. Gellatly*, L. R., 2 Ch. 751. *Anderson v. Read*, 22 W. R. 527, (*cor. Hall, V. C.*), where the trust for investment is stated to have been "comprehensive," appears to be to the same effect.

G. O. 1st Feb. 1861.—The general order of 1st February, 1861, does not appear to affect the rule in the case of improper securities left unconverted. But securities authorized by it, or by the statutes on which it is founded, are proper investments for a testator's estate, although not expressly authorized by the will; and the tenant for life will be entitled as income to the annual proceeds of such in-

vestments, when actually found, or made, part of the testator's estate, *Hume v. Richardson*, 4 D., F. & J. 29.

(*p*) *Pickering v. Pickering*, 4 My. & Cr. 303; *Turner v. Newport*, 2 Phil. 14, 14 Sim. 32; *Hinves v. Hinves*, 3 Hare 611; Lord Eldon's observation in *Howe v. Lord Dartmouth*, 7 Ves. 148; *Wilkinson v. Duncan*, 23 Beav. 469, (where the interest of the tenant for life was held to be the difference between the value at the year's end, and the amount actually recovered, which is in fact equivalent to giving the tenant for life £4 per cent. on the value at the year's end;) *Johnson v. Routh*, 27 L. J., Ch. 305, and *Countess of Harrington v. Atherton*, 2 D., J. & S. 352, (where the tenants for life of the reversion were already tenants for life in possession of the fund;) *Cox v. Cox*, L. R., 8 Eq. 343; *Wright v. Lambert*, 6 Ch. D. 649. The principle seems not to have been applied, where the income of a fund set apart for a particular purpose, becomes during a period undisposed of, and falls into the residue. In such cases the tenant for life of the residue is held entitled only to the income arising from the investments as they are made of the undisposed-of income, and not to the dividends on a sum representing the capitalized value of the undisposed-of income. See *Tucker v. Boswell*, 5 Beav. 607; *Crawley v. Crawley*, 7 Sim. 427, and the cases *ante p.* *312, as to the persons entitled to the interest of income directed to be accumulated beyond the period allowed by the *Thellusson* act.

out, was to become payable at the end of so many years, calculated at £4 per cent. simple interest. On the value so ascertained, the tenant for life will be entitled to his proper number of years' interest, at £4 per cent., and the residue of the amount actually received, after deducting the amount of such interest, will form the capital of the fund; but the tenant for *life will not be entitled to any payment till the fund actually becomes productive, (q) and in case of his death before that time his personal representative will of course become entitled. In a case where there were both wasting and reversionary interests, the court, for the benefit of all parties, adjusted the payments to the tenant for life out of the wasting interests, so as to compensate for his loss of income under the reversionary interests. (r)

6. Where property ought to be, but from its nature *cannot be*, immediately converted, at least without great loss to the estate, the authorities are not quite uniform. Thus, in Gibson v. Bott, (s) where leaseholds directed to be converted could not be sold for want of a good title, Lord Eldon gave the tenant for life £4 per cent. from the testator's death "on a sum to be ascertained as the value *at the testator's death*." (t) Lord Langdale, in Mehrrens v. Andrews, (u) after the leases had expired, directed a value to be put upon them *having reference to the enjoyment had thereunder*, and that the income of the tenant for life should be taken as the dividends of the sum of consols which could have been purchased for that value; and in Meyer v. Simonsen, (x) where conversion could not, from the nature of the property, be immediately made, Sir J. Parker, V. C., decided, that interest at £4 per cent. should be allowed. He said there were three distinct classes of cases: "First, where the subject-matter of the bequest is either invested in the funds, or in some security of which the court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the *corpus* belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the court, of which the tenant for life will take the interest, and the remainderman

As to income
of property
which cannot
be converted.

(q) Taylor v. Clark, 1 Hare 170.

(r) Glengall v. Barnard, 5 Beav. 245.

(s) 7 Ves. 89.

(t) 1 Y. & C. C. C. 320, note (a).

(u) 3 Beav. 72.

(x) 5 De G. & S. 723; see Caulfield v. Maguire, 2 J. & Lat. 162.

the *corpus*. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, as in *Gibson v. Bott*, and *Caldecott v. Caldecott*. (y) There the rule is not to convert the property, but to set a value upon it, and give to the tenant for life £4 per cent. on such value, and the residue of the income must then be in*vested, and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainderman.] (z)

It remains to be considered, how far the preceding rules apply to cases, in which the residuary clause contains no express trust for conversion: as where a testator simply bequeaths all the residue of his personal estate in trust for A for life, and after his decease, for B absolutely. In such cases [the general rule of the court is, that all property of whatever kind, whether perishable or permanent, except what is invested on permanent government, (a) or real securities, must be converted and invested in £3 per cent. consols. (b) It follows] that as to property, which at the testator's death is invested upon permanent government or even real securities, the legatee for life is entitled to the actual income, *i. e.* the dividends or interest, from the period of the testator's decease. (c) But as to property which has a temporary duration only, as leaseholds, or annuities for lives or years, the actual income of which, it is obvious, partakes to some extent of the nature of capital, the same rule could not justly be applied, as it would evidently have the effect of conferring an undue advantage on the person entitled for life, at the expense of the ulterior taker. The fair course, [and at the present day the settled rule,] in such cases seems to be, to carry to account, as

(y) 1 Y. & C. C. C. 312.

(z) And see *Fearn v. Young*, 9 Ves. 549; *Walker v. Shore*, 19 Id. 387, 1 Y. & C. C. C. 321, n.; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601; *In re Llewellyn's Trust*, 29 Beav. 171; *Brown v. Gellatly*, L. R., 2 Ch. 751, (as to the ships.) But see *Crawley v. Crawley*, 7 Sim. 427, *contra*.

(a) Including those authorized by G. O. 1st Feb., 1861.

(b) *Howe v. Lord Dartmouth*, 7 Ves. 137; *Thornton v. Ellis*, 15 Beav. 193. This rule applies in favor of one having

a life annuity charged on a wasting fund or on residue, *Fryer v. Buttar*, 8 Sim. 442; *Wightwick v. Lord*, 6 H. L. Cas. 217. It also applies to reversionary interests in favor of the tenant for life, *Hinves v. Hinves*, 3 Hare 611: and also where trustees have an express option to convert or retain existing securities, and they decline to exercise it, *Prendergast v. Prendergast*, 3 H. L. Cas. 195; see also *Baud v. Fardell*, 7 D., M. & G. 633, 634.]

(c) *Mills v. Mills*, 7 Sim. 501; and see *Howe v. Earl of Dartmouth*, 7 Ves. 137.

capital, the income accruing from the time of the testator's decease; and, in lieu of such income, to pay to the legatee for life from that period, a sum equal to the dividends which the produce of the sale would have yielded, if invested in three per cent. stock; such investment, however, not being supposed to be made until the period of the actual sale (if within the year,) though it regulates the income retrospectively from the testator's death. But if the sale does not take place within a year after the testator's decease, the amount must, it should seem, be regulated by the presumed proceeds, *i. e.* the value at the end of such *year, together, in either case, with dividends on the *interim* income of the terminable unconverted property. (*d*)

What would be the destination of income arising from a fund, which, though not wasting or fluctuating, is precariously secured, is more doubtful. It would clearly be the duty of any executor or trustee to call in the money as soon as possible; (*e*) but in the meantime, if the fund should happen to yield a larger amount of income than a proper investment, (as in the case of a loan on personal security at £10 per cent.,) the trustee or executor could not, it is conceived, with safety pay the legatee for life the actual income, though no loss of principal were eventually sustained; having regard to the severe lesson taught to trustees by the case of *Dimes v. Scott*, (*f*) in which, however, it is to be remembered, there was an express trust for conversion.

As to income
of a fund pre-
carious, but
not wasting.

Every well-drawn will, of course, precludes all such questions by explicit declaration; and this remark will serve to conduct to the next point for inquiry, namely,

(*d*) *Fearns v. Young*, 9 Ves. 549; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Mills v. Mills*, 7 Sim. 501; [*Morgan v. Morgan*, 14 Beav. 72; *Fryer v. Buttar*, 8 Sim. 442; *Benn v. Dixon*, 10 Sim. 636; *Chambers v. Chambers*, 15 Sim. 183; *Smith v. Pugh*, 6 Jur. 701; *Lichfield v. Baker*, 2 Beav. 481, 13 Id. 447. But see *Sutherland v. Cooke*, 1 Coll. 503, and] *Crawley v. Crawley*, 7 Sim. 427, where £4 per cent. was allowed, and a remark on the last case, *Hayes and Jarm. Con. Wills*, (3d ed.) p. 227. [The rule that the tenant for life is only entitled to so much for income as the property would have produced if sold and

invested in consols, does not apply where the testator dies, and his property and the persons entitled under his will reside out of the jurisdiction of the Court of Chancery, but it attaches as soon as the persons entitled arrive in this country, *Holland v. Hughes*, 16 Ves. 111.]

(*e*) *Thornton v. Ellis*, 15 Beav. 193. But see *Johnson v. Johnson*, 2 Coll. 441.

(*f*) See [*Caldecott v. Caldecott*, 1 Y. & C. C. C. 737: but] *contra*, *Douglas v. Congreve*, 1 Kee. 410; [and *Mehrtens v. Andrews*, 3 Beav. 72; where the fund was both wasting and precarious.]

What amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy in specie the property which is the subject of disposition? This, of course, like all others, is a question of construction, to be elicited from the whole will; and on which a right conclusion can be formed only by an attentive examination of the cases; some of which will be found to turn upon rather nice distinctions.

It is clear, that where a testator gives the income of a specific fund to a person for life, in terms exclusively applicable to describe the income in the then state of the property, the ulterior legatee cannot call for its conversion, even though it be of a wasting nature. As in *Vincent v. Newcombe*, (g) where a testatrix who was possessed of long annuities, and no other stock, bequeathed certain annual sums to be paid out of her "funded property," and then gave to A the whole of the remainder of her *dividends* *during her natural life; and at A's decease, the testatrix gave sums of stock to various persons, using in such bequests terms applicable not to long annuities, but rather to capital, as £1000 stock, &c. The ulterior legatees claimed to have the long annuities converted into three per cents., on the ground, that, as the long annuities were a decreasing fund, the ulterior legatees might, by the progress of such decrease, be disappointed of their legacies: but Lord Lyndhurst decided, that A was entitled to the residue of the long annuities during her life, under the words "the whole of the remainder of my dividends." *A fortiori* are trustees not justified in converting into a permanent stock long annuities [passing by a specific bequest of "all stocks and funds standing in" the testator's name] in trust for a person for life, and then to the other persons absolutely. (i)

[But according to the doctrine of the present day, the question does not depend on the legacy being specific or not.] (k) The same principle applies, even to a residuary clause, if an

What expressions prescribe an enjoyment in specie.

In the case of a specific bequest;

—of a non-specific bequest.

(g) 1 You. 599; [and see *Cockran v. Cockran*, 14 Sim. 248.]

(i) *Lord v. Godfrey*, 4 Mad. 455; [see also *Milne v. Parker*, 12 Jur. 171; *D'Aglie v. Fryer*, 12 Sim. 1; *Bethune v. Kennedy*, 1 M. & Cr. 117; *Hubbard v. Young*, 10 Beav. 203, (gift of "my property," "my property is in the India House,")

Boys v. Boys, 28 Beav. 436, ("property yielding income at my decease.") And see *Mills v. Brown*, 21 Beav. 1.

(k) Per Lord Langdale, 10 Beav. 205; and see 4 My. & Cr. 299, 1 Drew. 181, overruling *dictum* of Shadwell, V. C., in *Mills v. Mills*, 7 Sim. 508, 509.

intention that the property shall be enjoyed in specie can be collected from the terms in which either the life interest, or the ulterior subject of disposition, or both these interests, is or are bequeathed. [For the general rule stated above as to the conversion of perishable into permanent securities, did not originally ascribe to testators the intention to effect such conversions except in so far as a testator may be supposed to intend that which the law will do: but the court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property as the only means of giving effect to that intention. But if the will express an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. (*l*) It has been said that the effect of the later cases is to allow small indications of intention to prevent its application: (*m*) but it must be done by a fair construction of the will, the burden being always on those who would exclude the rule. (*n*)

*A direction to renew or keep in repair (*o*) or to demise (*p*) or discharge encumbrances on (*q*) leaseholds, (*r*) points to enjoyment in specie; and where after a bequest of a residue for life there is an express trust for conversion at a speci-

Expressions
which pre-
scribe enjoy-
ment in specie.

(*l*) Per Wigram, V. C., in *Hinves v. Hinves*, 3 Hare 611.

(*m*) 14 Beav. 82; and see 3 Hare 612, 613.

(*n*) *Macdonald v. Irvine*, 8 Ch. D. 101.

[*o*] *Crowe v. Crisford*, 17 Beav. 507.

(*p*) *Hind v. Selby*, 22 Beav. 373; *Thursby v. Thursby*, L. R., 19 Eq. 395.

(*q*) *In re Sewell's Estate*, L. R., 11 Eq. 80.

(*r*) If specifically devised leaseholds are sold compulsorily, and the purchase-money is invested in consols, the tenant for life is entitled to have his income made up out of the *corpus*, *Jeffreys v. Conner*, 28 Beav. 328: and see *In re Pfleger*, L. R., 6 Eq. 426, and cases cited. But where leaseholds renewable by usage but not by law (as church lands) are thus specifically bequeathed, with a positive trust to renew and to pay the fine out of the rents, the testator thus shows an in-

tention to treat the property as permanent: so that if it be compulsorily sold, the tenant for life has no such right. *In re Wood's Estate*, L. R., 10 Eq. 572. So if renewal is refused by the lessor, the unexpired leasehold ought to be converted into a permanent fund. This, together with the renewal fund, if any, formed out of rents, will be *corpus*, to the income only of which the tenant for life will be entitled, *Hollier v. Burne*, L. R., 16 Eq. 163, (where, p. 167, Lord Selborne's statement of "the general law of the court" is not true if applied to specific gifts, though unless so applied is irrelevant,) *Maddy v. Hale*, 3 Ch. D. 327; distinguishing *Tardiff v. Robinson*, 27 Beav. 629, n.; *Morres v. Hodges*, Id. 627; *Hayward v. Pile*, L. R., 5 Ch. 214; in which there was no absolute trust to renew, and the tenants for life were held entitled to the rents in specie.

fied period, it will be inferred that no conversion is to take place previously to that period, and the tenant for life, therefore, takes the income in specie; (s) so where there is a power to sell generally, (t) and *a fortiori* where there is a direction not to sell without consent, (u) or for a definite term of seven years, (x) or a direction is given either to

Effect of trust to convert all except specified part;

sell or not. (y) And an express trust to convert all "except government stock" entitles the tenant for life to specific enjoyment of long annuities. (z) And this was so

held, even though in the same will the trustees were directed to invest the proceeds of conversion in "government stock," a direction which admittedly did not authorize them to invest in long annuities: the reason why it did not do so being not that long annuities did not come within the words of the direction as well as within the words of the exception, but because the court would not permit the trustees to select

—of power to retain specified part;

perishable securities. (a) From this latter position it is no long step to hold that a power to retain "government

stock" following a trust to sell all (without exception) does not authorize trustees to retain long annuities. (b) *Still less could long annuities be properly retained (even though there were no express trust for sale,) if the power were in general terms for the trustees to leave the testator's moneys invested as they should find them, (c) or a power to retain "undoubted real or personal securities." (d)

Again, a power to sail the testator's ships for the benefit of his estate till they can be satisfactorily sold, (e) or a direction —of directions for interim management; to sell a horse if a stated sum should be offered, if not, to

(s) *Alcock v. Sloper*, 2 My. & K. 699; *Hunt v. Scott*, 1 De G. & S. 219; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Harvey v. Harvey*, 5 Beav. 134; *Rowe v. Rowe*, 29 Beav. 276. In *Mills v. Mills*, 7 Sim. 508, the direction to convert had reference to a conversion into *actual money* for the purpose of making loans, and did not therefore exclude by implication a previous conversion into *other investments*.

(t) *Burton v. Mount*, 2 De G. & S. 383; *Bowden v. Bowden*, 17 Sim. 65; *Skirving v. Williams*, 24 Beav. 275; In re *Llewellyn's Trust*, 29 Beav. 171. But see *Jebb v. Tugwell*, 20 Beav. 84.

(u) *Hinves v. Hinves*, 3 Hare 609; *Ellis v. Eden*, 23 Beav. 543.

(x) *Green v. Britten*, 1 D., J. & S. 649.

(y) *Simpson v. Lester*, 4 Jur. (N. S.) 1269.

(z) *Howard v. Kay*, 27 L. J., Ch. 448; *Wilday v. Sandys*, L. R., 7 Eq. 455. See also *Grant v. Mussett*, 8 W. R. 330.

(a) *Per Lord Romilly*, L. R., 7 Eq. 457.

(b) *Tickner v. Old*, L. R., 18 Eq. 422.

(c) *Porter v. Baddeley*, 5 Ch. D. 542. And see In re *Llewellyn's Trust*, 29 Beav. 171 (express trust to convert.)

(d) *Preston v. Melville*, 15 Sim. 35 (express trust to convert.)

(e) *Brown v. Gellatly*, L. R., 2 Ch. 751.

Cf. *Thursby v. Thursby*, L. R., 19 Eq. 395.

let him, and if a sale should be made, to invest the money, (*f*)—a sale upon the first good opportunity being in each case evidently contemplated—shows no intention to alter equities between successive takers, but only to regulate the discretion of the trustees in conducting the sale, and will not give the tenant for life the actual profits made before sale. So a direction to convert certain specific parts of the personal estate does not imply that the residuary estate is not to be converted; (*g*) neither does a direction to sell the residuary personal estate for payment of debts and legacies imply that it is ^{—of trust to convert specific part, &c.} to be sold for no other purpose; since a sale for the purpose of making those payments is no more than the law itself would order in the common course of administration without an express direction. (*h*) A power to vary securities, though an insufficient ground for conversion in the case of a specific gift, (*i*) yet affords a strong argument in favor of a sale when it has reference to a residuary bequest. (*j*)

Where various items of property are dealt with together, the fact that some of them are clearly to be enjoyed in specie, (and more especially if these be of a kind which, according to the general rule, ought to be converted,) affords an argument in favor of the remaining items having been also intended to be so enjoyed; (*k*) an argument, however, which requires other corroborative circumstances to render it conclusive. (*l*)

*An intention that the tenant for life shall enjoy the property in specie is sometimes collected from the circumstance that the terms of the gift over point to the very property as it existed at the testator's death. Thus, in] *Collins v. Collins*, (*m*) where the words of the bequest were "I give to

Where of several items in one gift some are clearly subject to sale.

Where the gift in remainder points to the very property.
Collins v. Collins.

(*f*) *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601. See *Gibson v. Bott*, *ante* p. *610.

(*g*) *Cafe v. Bent*, 5 Hare 34; *Morgan v. Morgan*, 14 Beav. 85, 86; *Hood v. Clapham*, 19 Beav. 90. *Secus* where all is directed to be sold except specific parts, see cases cited *ante* p. *614.

(*h*) *Caldecott v. Caldecott*, 1 Y. & C. C. 312; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441.

(*i*) *Lord v. Godfrey*, 4 Mad. 455.

(*j*) *Morgan v. Morgan*, 14 Beav. 85.

(*k*) *Bethune v. Kennedy*, 1 My. & Cr. 114; *Burton v. Mount*, 2 De G. & S. 383; *Simpson v. Earles*, 11 Jur. 921, V. C.

Wigram; *House v. Way*, 12 Jur. 958, 18 L. J., Ch. 22, V. C. *Wigram*; *Howe v. Howe*, 14 Jur. 359, (K. Bruce, V. C.); *Cotton v. Cotton*, Id. 950; *Booth v. Coulton*, 7 Jur. (N. S.) 207, (freehold distillery with *utensils*, &c., let together at one rent); *Holgate v. Jennings*, 24 Beav. 623, where it was said that though investments were to be enjoyed in specie, debts, as turnpike bonds, must be got in.

(*l*) *Howe v. Earl of Dartmouth*, 7 Ves. 138; *Blann v. Bell*, 5 De G. & S. 658, 2 D., M. & G. 775.]

(*m*) 2 My. & K. 703.

my wife, all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir J. Leach, M. R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator, that his widow should enjoy the leasehold property for her life.

Again, in *Pickering v. Pickering*, (n) where a testator gave to his wife, subject to the payment of his debts and legacies, and such annuities and assurances as he was liable to pay, all the interest, rents, dividends, annual produce and profits, use and enjoyment, of his real and personal estate, for life; and at her decease, the testator gave all the rest and residue of his estate, real and personal, to his son-in-law; but, in case of his dying before the testator's wife, then he directed the residue to be divided in manner therein mentioned. Part of the testator's property consisted of a leasehold house and a life annuity; and the charges thereon also comprised annual payments. Lord Langdale, M. R., decided, that in this case the testator had indicated an intention that the property should be specifically enjoyed by his wife during her life; and Lord Cottenham, on appeal, (o) was of the same opinion; grounding his judgment especially on *Collins v. Collins*, to which he thought the direction to divide the property on a certain event precisely assimilated the case before him. He remarked that in *Collins v. Collins* there were expressions only applicable to the actual condition of the property.

[In *Harris v. Poyner*, (p) the testator devised and bequeathed all the residue of his real and personal estate, "and all his estate, term and interest therein," to trustees in trust for his wife for life, and after her death, he devised "*the same, and all his estate, term and interest therein*" to his son; Sir R. Kindersley, V. C., thought *that the testator intended the son to take the identical property, and, therefore, that there was to be no conversion during the life of the widow.

In *Pickup v. Atkinson*, (q) the ground on which the conversion was

(n) 2 Beav. 31.

[(o) 4 My. & Cr. 289.

(p) 1 Drew. 174; but see *Lichfield v.*

Baker, 2 Beav. 481, 13 Id. 447; *Thornton*

v. Ellis, 15 Beav. 193; *Bowden v. Bowden*, 17 Sim. 65.

(q) 4 Hare 624.

opposed was, that there was a gift to the tenant for life of the *rents*, profits, dividends and interest of all the residue, &c., and that if leaseholds comprised in the residue were to be converted, the word “rents” would, in effect, be struck out of the will. In support of this *Goodenough v. Tremamondo* (*r*) was cited, where Lord Langdale, M. R., relying on the use of that word in the gift for life, and gift over, held that there was to be no conversion; but Sir J. Wigram, V. C., in deciding that there must be a conversion in the case before him, said, that according to that argument, the use of the words “dividends,” (*s*) “interest,” would prevent the conversion of any property yielding income denominated by those words. However, in *Cafe v. Bent*, (*t*) where a testator directed a percentage on the receipt of the “rents” of the residue, after satisfying “all ground rents and other outgoings,” to be paid to his son, and none of the property included in the residue except leaseholds produced “rents,” the same judge held that the leaseholds were to be enjoyed in specie. This conclusion was probably fortified by a different percentage being given on the “dividends” arising from the residue.]

Sometimes, a testator combines with the general words of a residuary clause, an enumeration of certain species of property, thus raising the question, whether the enumeration is to be considered as taking the specified property out of the rule applicable to a general residue. [There is great authority for saying that such enumeration of particulars, unless it is enough to make the bequest of those particulars properly “specific,” is insufficient of itself to exclude the rule.] (*u*)

*In *Bethune v. Kennedy*, (*x*) [the bequest was held to be specific.]

(*r*) 2 Beav. 512; and see *Marshall v. Bremner*, 2 Sm. & Gif. 237; *Crowe v. Crisford*, 17 Beav. 507; *Skirving v. Williams*, 24 Beav. 275. And apparently its effect is not impaired by the circumstance of the leaseholds being included in the same gift with freeholds: *i. e.* the word is not applied exclusively to the latter, *Hood v. Clapham*, 19 Beav. 90; *Wearing v. Wearing*, 23 Id. 99; *Vachell v. Roberts*, 32 Beav. 140; but see *Craig v. Wheeler*, 29 L. J., Ch. 374.

(*s*) Some stress was laid upon this word by Sir J. Leach, in *Alcock v. Sloper*; and see *Blann v. Bell*, 5 De G. & S. 658; *Bow-*

den v. Bowden, 17 Sim. 65.

(*t*) 5 Hare 24; see *Neville v. Fortescue*, 16 Sim. 333.

(*u*) *Stirling v. Lydiard*, 3 Atk. 199; *Mills v. Mills*, 7 Sim. 508; *House v. Way*, 18 L. J., Ch. 22, 12 Jur. 959; *Cotton v. Cotton*, 14 Jur. 950; *James v. Gammon*, 15 L. J., Ch. 217; *Simpson v. Earles*, 11 Jur. 921; *Pickup v. Atkinson*, 4 Hare 628; and see *Sutherland v. Cooke*, 1 Coll. 504; *Morgan v. Morgan*, 14 Beav. 72; *Craig v. Wheeler*, 29 L. J., Ch. 374; In re Tootal's Estate, 2 Ch. D. 628.]

(*x*) 1 My. & Cr. 114.

*Bethune v.
Kennedy.*

There a testatrix, after bequeathing £100 long annuities to A and B, added, "the residue of my property, all I do or may possess in the funds, copy or leasehold estates, to my dear sisters M. and H., during their lives; at the decease of both of them to be equally divided, share and share alike, between my cousins," (naming them.) Part of the residue consisted of £150 long annuities; and the question was, whether the legatees for life were entitled to receive the annuities, or whether they ought to be turned into a permanent fund. Sir C. C. Pepys, M. R., decided in favor of the former construction, on the ground, that it was not a mere residuary clause, but a specific bequest of the sum belonging to the testatrix in the long annuities; and was to be enjoyed by the legatee for life, in the state in which the testatrix left it. As to the copyhold or leasehold estates, he said, it was not disputed that the gift was specific; and if so, why should it not also be specific with respect to the funds? The intention, it was reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there could be no doubt, he observed, that a bequest of all that a testator may possess in the funds, would be a specific bequest of all funded property; the rule being, that the legacy is not the less specific for being general. The M. R. considered, that the case was distinguishable from *Alcock v. Slopers*, where the argument in favor of the non-conversion was founded on the terms in which the income was given, and not (as here) on the mode of bequeathing the capital.

[The decision in the last case was followed by Lord Lyndhurst, C., in *Vaughan v. Buck*, (y) on a will of doubtful construction, which the L. C. said might for the purpose now in question be read thus:—"I give the whole of my property, viz., my house, 21, *North Street*, £1000 new £4 per cents., £1500 in the £3 per cent. consols, £645 in the £3 per cent. reduced, and £20 per annum long annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children:" it was held that the widow was entitled to enjoy the house, which was leasehold, and the long annuities, in specie. "With respect to the house," Lord Lyndhurst said, "the bequest is clearly specific, and as to the long annuities they constitute one of the items in the *testator's property existing at the date of the will, and

(y) 1 Phill. 75; see also *Hubbard v. Young*, 10 Beav. 203; *Mills v. Brown*, 21 Beav. 1.

which by this description he bequeathed to his wife. * * * *Bethune v. Kennedy* is similar in principle, and corresponds nearly in its circumstances with the present."

In *Oakes v. Strachey*, (z) there were two gifts to the testator's wife during widowhood, first, of the interest of all the money the testator had or might possess in the funds or on other securities; and, secondly, of the interest of all his other property, for the maintenance of herself, and the maintenance and education of the testator's children by her: the V. C. thought the testator had drawn a distinction between the two sorts of property, and that the former was to be enjoyed in specie, and the latter not.

Oakes v. Strachey.

If wasting property (as leaseholds) bequeathed in specie be converted into a permanent fund, with the consent of the tenant for life, and he survives the period when the leaseholds would have expired, the capital of the permanent fund will become the absolute property of the tenant for life. (a) But a lease, in which the tenant for life is *cestui que vie*, would practically not become his absolute property immediately, at least not so as to enable him to assign or surrender it; for the chance of renewal for the benefit of the remainderman would be thereby lost, and it seems that on this account a sale or surrender by him would be set aside. (b) It may be here added, that a tenant for life in specie of a share in a partnership has been held not entitled to the increase of the capital made during his life.] (c)

Effect of conversion of wasting property with consent of tenant for life.

IV.—It is clear, that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest, such unexhausted interest, whether the estate be eventually sold or not, (d) belongs to the heir as real estate undisposed of. (e)⁸ The heir is excluded, not by the

Destination of undisposed-of interests in property directed to be converted.

(z) 13 Sim. 414.

(a) *Phillips v. Serjent*, 7 Hare 33; In re *Beaufoy's Estate*, 1 Sm. & Gif. 20.

(b) *Harvey v. Harvey*, 5 Beav. 134, where, however, under the peculiar cir-

cumstances, the sale was not held bad.

(c) *Mousley v. Carr*, 4 Beav. 49.]

(d) See *Hill v. Cock*, 1 Ves. & B. 173.

(e) 2 Vern. 571; Id. 645; 3 P. W. 20; 2 Dick. 500; 1 B. C. C. 503; 2 B. C. C.

8. The rule is well established that an unexhausted surplus, after carrying out all the purpose for which the conversion

was directed, goes to the heir as real estate, *North v. Valk*, C. W. Dud. Eq. 212; *Monroe v. Jones*, 8 R. I. 526; *Whar-*

*direction to convert, but by the disposition of the converted property, and so far only as that disposition extends. Thus, in *Wilson v. Major*, (f) where lands were given by a testator to his wife upon trust to sell and invest the money upon security at interest; and he gave and bequeathed the interest and dividends of the same to the use of his said wife, without making any ulterior disposition of the fund, Sir W. Grant, M. R., held, that, there being no declaration of the trust of the money beyond the life of the wife, it resulted to the testator's heir.

And the same principle, it is now settled, applies in the converse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund *ultra* that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next of kin of the testator, on the ground that the will operates to convert the fund so far only as it disposes of it.

Thus, in *Cogan v. Stephens*, (g) where the testator directed his executors immediately to lay out the sum of £30,000 in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate (which was to be purchased and always run in the testator's name) was given to a charity.

589; 3 B. C. C. 355; 4 B. C. C. 411; 2 Ves., Jr., 271; Id. 683; 3 Ves. 210; 4 Ves. 542; Id. 803; 10 Ves. 500; 11 Ves. 87; Id. 205; 12 Ves. 413; 16 Ves. 188; 18 Ves. 156; 1 Ves. & B. 173; Id. 410; 2 Ves. & B. 294; 2 Kee. 564; [1 R. & My. 752; 5 My. & Cr. 125; 4 Y. & C. 507.] The case of *Ogle v. Cook*, cited 1 B. C. C. 512, had been considered as a solitary exception to this class of cases; but it was afterwards discovered that the very point which was alleged to have made it so was left undecided. See R. L., cited 2 Ves., Jr., 686.
(f) 11 Ves. 205; see also *Robinson v. Taylor*, 2 B. C. C. 389.
(g) 1 Beav. 483, n., [5 L. J. (N. S.) Ch. 17.]

ton v. Shaw, 3 Watts & S. 124; *Wilson v. Hamilton*, 9 Serg. & R. 424; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *Smith v. Kearney*, 2 Barb. Ch. 533; *Winants v. Terhune*, 2 McCart. 185; *Smith v. First Church*, 11 C. E. Gr. (N. J.) 132; *Oberle v. Lerch*, 3 C. E. Gr. (N. J.) 346, (affirmed p. 575); *Trippe v. Frazier*, 4 Har. & J. 446; *Hilton v. Hilton*, 2 MacArth. 70; *Rinehart v. Harrison*, Baldw. C. C. 177; *McCarty v. Terry*, 7 Lans. 236. In these cases it is considered that the conversion was only intended so far as there are purposes provided by the will to exhaust the fund, *Wood v. Cone*, 7 Paige 472. A like will governs cases where only a partial disposition, e. g. of a life interest, is made by the will, *Wood v. Keyes*, 8 Paige 365; *Snowhill v. Snowhill*, 1 Gr. Ch. (N. J.) 39. But, in Ohio, where one-third of the estate converted was to go to the wife and the residue to the heir, there being no heir capable of inheriting, the entire interest vested in the wife, *Ferguson v. Stuart*, 14 Ohio 140.

The money was not laid out, and the gift to the charity being void under the statute of mortmain, and the prior limitations having determined, it was held by Sir C. Pepys, M. R., that the next of kin, and not the heir-at-law of the testator, was entitled to the fund.

So, in *Hereford v. Ravenhill*, (*h*) where a testator gave his ready money and the money which should be owing to him, to trustees, upon trust, as soon after his decease as a convenient purchase could be found, to invest it in the purchase of freehold, copyhold, or leasehold hereditaments to be settled to certain uses. These limitations having failed (some of them in the lifetime of the testator, and the rest subsequently,) Lord Langdale, M. R., in a suit for ascertaining who was entitled to the fund, which had not been laid out, held, that the heir was not a necessary party; observing, that it had been decided in *Cogan v. Stephens* that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which would take effect, entitled to the *personalty, as being impressed with the character of real estate; [and he subsequently decreed the residuary legatee to be entitled.] (*i*)

And the same rule obtains, where the testator's disposition of the converted property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.⁹

Lapsed shares of proceeds of real estate devolve to heir.

The title of the heir, under such circumstances, to a lapsed share of real estate directed to be sold, was established in *Ackroyd v. Smithson*, (*k*) well known as containing the celebrated argument of Lord Eldon (then Mr. Scott,) which Lord Thurlow admitted to have changed his opinion. The testator devised all his real and personal estate in trust to be sold and converted into money, to pay debts, legacies, and funeral expenses; and the overplus to be paid to certain

(*h*) 1 Beav. 481.

[*i*] *Hereford v. Ravenhill*, 5 Beav. 51.] *Fletcher v. Chapman*, 3 B. P. C. Toml. 1, [where, however, no claim appears to have been made by the next of kin,] and a *dictum* of Lord Redesdale, 3 Dow 207, (see also 4 B. C. C. 527,) are

thus virtually overruled.

9. See *Slocum v. Slocum*, 4 Edw. 613.

(*k*) 1 B. C. C. 503. [But where the court or a trustee sells more than necessary of the estate of a *living owner*, there is no equity to reconvert for his heir, L. R., 18 Eq. 197; *ante* *162.]

persons (to whom he had bequeathed pecuniary legacies,) in proportion to their respective legacies. Some of these legatees died in the testator's lifetime; and, on a question whether their lapsed shares belonged to the heir-at-law or next of kin of the testator, Lord Thurlow at first inclined to the opinion that the next of kin were entitled, but, upon further argument, he decided in favor of the heir. He said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed-of money would be personalty; but the cases fully proved the contrary. It would be too much, he observed, to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet that, because a sale was necessary, the heir should not take the undisposed part of the produce.

So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.¹⁰

And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real estate; the effect in such case being that, by the failure of the intended disposition, the real estate descends to the heir, and the personalty devolves to the next of kin of the testator. Thus, in *Jessopp v. Watson*,⁽¹⁾ where a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters; and if no such child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried. Sir J.

10. To the same effect see *Bonard's Will*, 16 Abb. Pr. (N. S.) 128, where the conversion failed, being for the purpose of a bequest to a charitable corporation incapable of taking land, and the direction being to turn the money into real estate; so *Harris v. Clark*, 7 N. Y. 242, for void trusts; so *Lorillard v. Coster*, 5 Paige 172; *Hawley v. James*, 5 Paige 318; S. C., 7 Paige 213; *North v. Valk*,

C. W. Dud. Eq. 212; but see, *contra*, *Evans' Appeal*, 63 Penna. St. 183, where the conversion took effect under a direction to sell and pay the proceeds to certain charities, though the gift to the charities was void.

(1) 1 My. & K. 665; [see also *Roberts v. Walker*, 1 R. & My. 752; *Edwards v. Tuck*, 23 Beav. 268; *Bedford v. Bedford*, 35 Id. 584.]

Leach, M. R., held, that so much of the residuary fund as was constituted of real estate, descended to the daughter as heir-at-law; and that so much as was constituted of personalty devolved to and was divisible among the persons entitled under the statute of distribution to the personal estate of the testator.

So, in *Eyre v. Marsden*, (*m*) where a testator gave his real and personal estate to trustees upon trust, at any time after his decease to sell and convert the property, and during the lives of his children to accumulate the annual income; and, after the decease of his surviving child, he gave the produce of the real and personal estate (directing such part as had not been previously converted, to be then converted) to his grandchildren. One of the children having survived the testator more than twenty-one years, the trust for accumulation became void for the excess under the *Thellusson* act, (*n*) and the income, being held to be thenceforth undisposed of during the life of the surviving child, was claimed by the next of kin of the testator, as well of the proceeds of the real as the personal estate, on the ground that there was an absolute conversion. But Lord Langdale, M. R., decided that it belonged to the heir, observing that the sale was directed for the purposes of the will, and for the benefit of the legatees, not for the benefit of the next of kin, whose claim was therefore confined to the income of the personal estate.

The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion. (*o*) The learned editor of Peere William's reports, in a note which has often *been referred to with commendation, (*p*) states the question in those cases to be, "whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of his will." There seems to be no ground to except to this statement of the doctrine, provided that, by an indication of intention to give to real estate the quality of personalty "to all intents," we are allowed to understand something very special and unequivocal, amounting, in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alterna-

Conversion for
purposes of
will—what.

(*m*) 2 Kee. 574.

(*n*) *Ante* p. *302.

(*o*) *Wright v. Wright*, 16 Ves. 188.

(*p*) *Cruse v. Barley*, 3 P. W. 20, Mr. Cox's n.

tive gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition.¹¹ Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." The respective claims of his own representatives, it may be confidently affirmed, are, in such cases, not in the contemplation of the testator, who always calculates on his legatees surviving him. [Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate, (q) nor such a direction joined with an express declaration that the heir-at-law shall not take in case of lapse, (r) will exclude the claims of the heir-at-law.]

11. As to "out and out" conversion, where there is a general and positive direction to sell, see *Story Eq. Jur.*, § 790; *Wms. Ex'rs* (6th Am. ed.) 729; 1 *Rop. on Leg.* 501; 3 *Redf. on Wills* 139; *Hawkins on Wills* 97; *Bispham Eq.*, § 317; *Tazewell v. Smith*, 1 *Rand.* 313; *Mathis v. Guffin*, 8 *Rich. Eq.* 79; *Wilkins v. Taylor*, *Id.* 291. See also *Sharpley v. Townsend*, 4 *Harring. (Del.)* 336; *Henderson v. Wilson*, 1 *Dev. Eq.* 313; *Wurts v. Page*, 4 *C. E. Gr. (N. J.)* 365, which was a trust to invest for children and pay their shares in a certain way; *Smith v. First Church*, 11 *C. E. Gr. (N. J.)* 132, where the direction was to sell and pay debts and funeral expenses out of the proceeds, and the personal property proving insufficient for debts or legacies, it was held that an "out and out" conversion was intended and the surplus of proceeds of real estate after payment of debts was applied toward the legacies; *Arnold v. Gilbert*, 5 *Barb.* 190, reversing 3 *Sandf.*

Ch. 531, where there was an apparent general intent to convert, with a direction to sell for particular purposes; *Marsh v. Wheeler*, 2 *Edw.* 156, where the direction was to sell and divide among the children; so *Bogert v. Hertell*, 4 *Hill (N. Y.)* 492; *King v. Woodhull*, 3 *Edw.* 79.

[(q) *Taylor v. Taylor*, 3 *D., M. & G.* 190, overruling *Phillips v. Phillips*, 1 *My. & K.* 649; and see *Robinson v. London Hospital*, 10 *Hare* 19; *Gordon v. Atkinson*, 1 *De G. & S.* 478; *Flint v. Warren*, 16 *Sim.* 124; *Shallcross v. Wright*, 12 *Beav.* 505; *Hopkinson v. Ellis*, 10 *Id.* 169; *Williams v. Williams*, 5 *L. J., (N. S.) Ch.* 84; *Collins v. Wakeman*, 2 *Ves., Jr.*, 683 (as to the £1000.) But *Jessel, M. R.*, though he admitted it was so settled, yet thought such a direction might well have been held to mean that the next of kin should take, 1 *Ch. D.* 610.

(r) *Fitch v. Weber*, 6 *Hare* 145; *Sykes v. Sykes*, *L. R.*, 4 *Eq.* 200.]

Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir W. Grant, (s) that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he *said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect. Such a conversion, however, as that referred to by his Honor, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expressions showing that it is not so confined. In short, it must be manifest that the property is to be considered as personalty *quoad* this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors. In *Kidney v. Coussmaker*, (t) it had been held, that where a testator had devised real estate in trust to be sold, and directed the produce [to be applied in payment of the encumbrances on the estate, and the remainder] to be considered as part of [the residue of his] personal estate, and then bequeathed the [residue of his] personalty after payment of his debts, the fund was subjected to the debts. Sir W. Grant, in the last case, expressed his doubt of the soundness of the decision, [but more recently it has been approved. (u)]

As to conversion subjecting fund to simple contract debts.

Again, where a testator, having devised lands to trustees upon trust for sale, did not dispose of the surplus proceeds, and died without heir or next of kin, it was held that the crown had no title to the surplus proceeds, (as it would have had if they had been personalty,) but that the trustees were entitled to retain them for their own benefit.] (x)

Trustees entitled where no heir.

In farther confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of personalty in the same will, unless the testator expressly declare that it shall be considered as part of his personal estate, [or unless such an intention can be collected from the force and meaning of the expressions used by the testator through the whole will. (y)]

As to proceeds of real estate, passing under a residuary bequest.

Thus, in *Berry v. Usher*, (z) the appointment of two persons as joint

(s) *Gibbs v. Ougier*, 12 Ves. 413.

(t) 1 Ves., Jr., 436.

[(u) *Bright v. Larcher*, 3 De G. & J. 156; *Field v. Peckett*, 29 Beav. 568.

(x) *Taylor v. Haygarth*, 14 Sim. 8. See

also *Cradock v. Owen*, 2 Sm. & Gif. 244, 245.

(y) See per Sir J. Leach, in *Phillips v. Phillips*, 1 My. & K. 661.

(z) 11 Ves. 87.]

Berry v. Usher. residuary executrix and executor was held not to give them the proceeds of real estate directed to be sold. And in] *Maugham v. Mason*, (a) where A devised freehold chambers to trustees and their heirs, upon trust to sell, and apply the money arising by such sale towards payment of the legacies by his will *bequeathed; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate, after payment of his debts, &c., bequeathed the same to trustees, upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir W. Grant held that the produce of the sale of the real estate, after payment of the legacies, resulted to the heir, and did not pass under the residuary bequest.

This construction, it will be observed, was somewhat aided by the circumstance of the trust being to convert the residue into money, which could not strictly apply to the money produced by the real estate; but the M. R., though he adverted to this circumstance, decided the case upon the general principle, that where there was a direction to sell land for a particular purpose, the surplus did not form "part of the personal estate, so as to pass by the residuary bequest."

[So, in *Dixon v. Dawson*, (b) the testatrix devised and bequeathed her real and personal estate upon trust to sell and convert, and out of the proceeds of the real estate to pay her debts and testamentary expenses, and also certain legacies and annuities, and in case the proceeds should be insufficient then to pay the same out of the personal estate, and she also bequeathed legacies to charities to be paid out of her personal estate, and then proceeded thus:—"Should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and personal and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies or sums of money herein bequeathed or directed to be paid thereout, then upon trust that my said trustees shall pay and transfer the residue and remainder of my *said estate and effects not hereby otherwise disposed of* unto, &c." It was decided by Sir J. Leach, V. C., that the last gift did not include the residue of the proceeds of the real estate, and that the heir-at-law was entitled.

And in *Collis v. Robins*, (c) where the testator devised real estate

(a) 1 Ves. & B. 410.

(b) 2 S. & St. 327.

(c) 1 De G. & S. 131. See also *Brown v. Bigg*, 7 Ves. 279, stated *ante* p. *603.

upon trust for sale, and out of the proceeds and the rents in the meantime to pay the testator's debts and the trustees' costs and certain legacies, and the will then proceeded, "and as to all and singular my ready moneys and securities for money to *me belonging, and all other my personal estate and effects whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath, &c." Sir J. K. Bruce, V. C., held that the surplus of the proceeds of the real estate belonged to the heir-at-law.

Collis v. Robins.

But it is clear that if there be a declaration that the money arising from the sale shall be considered as part of the testator's personal estate, it will pass under a general bequest of personalty in the same will. [For although there is no clear authority in the affirmative, (d) yet the argument adopted with reference to such a declaration in cases of intestacy as to part of the produce of land directed to be sold, viz., that the testator has adapted his language to a case of testacy but not to a case of intestacy, (e) while it excludes the next of kin admits the claim of the residuary legatee.]

Effect of declaration that proceeds shall be personalty.

And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance. Thus, where (f) a testator gave his real estate and the residue of his personalty to trustees, to sell and convert the same, and invest the proceeds, and then gave the interest, dividends and produce of the whole of his real estate, and of the residue of his personalty, to his wife for life, and after her decease he gave one moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his brother M., his executors, administrators and assigns, and he gave the other moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his sister-in-law B. for life; and, after her decease, he gave the *whole*

Inference that real and personal estate once blended are not to be afterwards severed.

(d) The point was included in the decision of *Collins v. Wakeman*, 2 Ves., Jr., 683, but was not argued for the heir. It seems to have been assumed, *Robinson v. London Hospital*, 10 Hare 27.

(e) See per Turner, V. C., *Robinson v. London Hospital*, 10 Hare 19, and other cases cited above.]

(f) *Byam v. Munton*, 1 R. & My. 503.

of the principal of such moieties, or the *whole residue of his estate* whatsoever and wheresoever, and the securities on which the same should be invested, to his said brother M., his heirs, executors, administrators and assigns; and the question being, *whether the sister-in-law was entitled to a moiety of the income arising from the proceeds of the real estate, Sir J. Leach, M. R., decided in the affirmative; he said, that the testator had made one mixed fund of the residue of the personalty and the proceeds of the sale of the real estate; that the whole was to be invested in government stocks, or on real securities, and the interest was to be paid to the widow during her life; that there was no intention that upon her death a division should take place of the personalty from the produce of the realty; and, in fact, such a division could not be made; that, therefore, the testator, in the moiety given to B. during her life, meant to include the real estate; and that this conclusion was strengthened by the clause immediately following, in which the testator used the phrase, "the whole of the principal of such moieties," as synonymous with, and equivalent to, "the whole residue of my estate, whatsoever and wheresoever," (g) and which was, consequently, a declaration that the moieties of which he spoke were moieties of the whole residue of his estate.

[The blending of the proceeds of the two estates for any purpose not exhausting the whole is always taken as rendering probable an intention that they shall be kept together throughout, and as inviting such a construction of subsequent words of gift as will carry that intention into effect. Thus, in *Court v. Buckland*, (h) where a testator devised and bequeathed his real and the residue of his personal estate in trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of debts and legacies) *according to the trusts thereafter declared concerning the same*. He then declared that until sale the real and personal estate should be subject to the trusts thereafter declared concerning the said net moneys, and that the rents and annual produce thereof should be deemed income *for the purposes of the same trusts*, and that the real estate should be transmissible as personal estate. The testator then directed a sum to be set apart *out of the said net moneys* to answer a life annuity, subject to which it was to form part of his *residuary personal estate*: and, subject to the annuity and to legacies and debts, the

[(g) See *Wall v. Colshead*, 2 De G. & J. 683.

(h) 1 Ch. D. 605. See also *Spencer v. Wilson*, L. R., 16 Eq. 501.

testator directed his trustees to stand possessed of *his residuary personal estate* in trust as to one moiety for his son, and, as to the other, for his daughter and her children. Sir G. Jessel, M. R., held that the net *proceeds of the real estate were included in the trusts of the “residuary personal estate.” He adverted, among other points, to the blending of the two estates, for the payment of debts and legacies and of an annuity, as warranting the inference alluded to above. He also noticed that the direction to treat the rents until sale as income “for the purposes of the same trusts” (*i. e.* the trusts of the net moneys) was unmeaning unless it referred to beneficial trusts of the income, and was intended to exclude the rule of the court, which gives the beneficiaries not the actual income but the dividends of so much consols. But, he observed, there were no trusts at all to which this direction, or to which the words “trusts hereinafter declared concerning the same” could apply, unless they applied to the trusts of “the residuary personal estate;” which trusts, moreover, were declared “subject to the annuity and to the debts and legacies,” which the testator had before said were to come out of the “net moneys.”

Again, in *Singleton v. Tomlinson*, (*i*) a testator directed his executors to pay his funeral expenses and debts “out of the proceeds of his property.” He then recited that he was possessed of “landed and chattel property,” and directed his executors to sell his “landed estates” for the best price. He gave certain legacies; he specifically devised a certain estate; and specifically bequeathed his plate and furniture; and concluded, “I constitute A my *residuary legatee*.” It was held in D. P., that A was entitled to the surplus proceeds of the real estate, as well as of the personal estate, after payment of the funeral expenses, debts and legacies. Lord Cairns said it was a complete scheme of disposition of the whole of the testator’s property of every kind, his intention being that his “property” (which clearly included real as well as personal property) should be turned into money, that his debts and his legacies should be paid, that the furniture and plate should be delivered to the person to whom it was bequeathed, and that he who was described as the “residuary legatee” should be entitled to the whole of the surplus. The

Effect, after blending, of appointing a “residuary legatee.”

(*i*) 3 App. Cas. 404. See also *Wildes v. Davies*, 1 Sm. & Gif. 482, and other cases *post* ch. XXII., § 6. In *Griffiths v. Pruett*, 11 Sim. 202, the gift was of “any sum appearing after fulfilling” the will, an expression as properly applicable to the proceeds of real estate as to personalty. And see *Bromley v. Wright*, 7 Hare 334.]

term “residuary legatee” standing alone, or (above all) in a will which appeared to make a division between real property and personal property, meant *prima facie* the person taking what the law calls the residue of the personal property; but it was a term *which must be fashioned and moulded by the context, and where you had a context in which the testator was found looking at his landed property, not as land, but as something which was all to be sold and turned into money, then the term became as applicable to the proceeds of landed property as it would have been in the first instance to personal property.

In the last case, the heir-at-law relied on] *Kellett v. Kellett*, (*k*) where a testator bequeathed legacies to several children; *Kellett v. Kellett*. he bequeathed his interest in certain lands to A, and then proceeded as follows:—“The remainder of my properties I devise to my executors to make good the above sums and the following sums, that is to say:” and then, after enumerating other legacies, he concluded thus:—“And I also ordain, appoint and devise the said W. G. and H. executors to this my last will and testament; *also my residuary legatees, share and share alike.*” It was contended by the executors that the real estates were by the will, and for the purposes of it, turned into personal estate, to the residue of which they were entitled; or that if there was no such conversion, yet, by the manifest intention of the testator, they were legally and beneficially entitled to such parts of the estates as should remain after payment of the debts, legacies, &c., except the estates specifically devised to A. But [Lord Manners held that the intention was not made plain enough to disinherit the heir.] The executors appealed to D. P., relying principally on the argument, that by constituting them residuary legatees the testator intended them to take the residue of all that was included under the word “properties” in the preceding devise: but the house refused to disturb the decree. Lord Eldon said, “I should very much misrepresent the state of my mind with respect to this question, if I did not say that it is a state of infinite doubt, whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the residue was intended by the testator to include the real estate. It is a whimsical way of putting it; but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree

(*k*) 1 Ba. & Be. 533, 3 Dow 248.

ought to be affirmed." Lord Redesdale expressed himself nearly to the same effect.

Although the trust clearly authorized a sale to pay legacies, there was no express direction to sell; [a fact upon which Lord *Manners laid great stress. But although the land was thus less clearly treated as "something that was all to be turned into money," it is reasonably plain that neither Lord Eldon nor Lord Redesdale, if the case had come originally before him, would have held that any part of the testator's "properties" was undisposed of. At the present day, the question must be treated as one purely of construction, unaffected by any special indulgence to the heir. No case, indeed, has gone further against the heir than the early one of] *Mallabar v. Mallabar*, (*l*) where a testator devised and bequeathed all his lands in certain counties to his sister C., her heirs and assigns, upon trust that the same should be sold, and out of the moneys arising therefrom his just debts paid; and out of the remainder of the money he bequeathed certain legacies including one to the heir-at-law; and then, after his debts and legacies paid as aforesaid, and subject to the same, the testator gave the residue of his personal estate to his said sister, whom he appointed sole executrix. The produce of the real estate, after paying debts, was claimed by the heir. Lord Talbot admitted parol evidence against him; but afterwards decreed, upon the will itself, that there was no resulting trust, and that the executrix should have the whole residue including the produce of the real estate.

The giving of the residue "after debts and legacies paid as aforesaid," certainly afforded an argument that it was intended to include the fund in question which had been expressly subjected to those charges. The case has always been considered as governed by its particular circumstances. (*m*)

It is observable, that where a *partial* undisposed-of interest in real estate directed to be sold results to the heir-at-law of the testator, it becomes personalty in his hands. Thus, in *Wright v. Wright*, (*n*) where A devised his real estate in trust to be sold to pay his debts, &c., and the residue in trust for his daughter,

(*l*) Cas. t. Talb. 78.

(*m*) 1 Ves. & B. 416.

(*n*) 16 Ves. 188; see also *Smith v. Claxton*, 4 Mad. 484; *Jessop v. Watson*, 1 My. & K. 665; [*Dixon v. Dawson*, 2 S.

& St. 327; *Carr v. Collins*, 7 Jur. 165; *Tily v. Smith*, 1 Coll. 434; *Hatfield v. Pryme*, 2 Coll. 204; *White v. Smith*, 15 Jur. 1096; *Bagster v. Fackerell*, 26 Beav. 469; *Wilson v. Coles*, 28 Beav. 215.

but if she died in the lifetime of his wife, to his wife for life, and, at her decease, to go as he (the testator) should by a codicil direct. He left no codicil. The daughter died in the widow's lifetime. The reversionary interest in the fund expectant on the widow's decease, which descended to the daughter as the heir-at-law of *the testator, was, at her death, claimed by her administratrix as personalty, and by her heir-at-law as real estate. Sir W. Grant held, on the authority of *Hewitt v. Wright*, (o) (in which the same principle was applied to a disposition by deed,) that it was personal estate in the daughter, and accordingly belonged to her administratrix. According to the doctrine already stated, (p) it is clear that no act on the part of the heir electing to take such partial interest as real estate would avail to change its character.

But if the purposes of the will *wholly* fail, as if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate, (q) [and in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed: (r) but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place. (s)]

In the converse case, *i. e.* where personal estate is directed to be laid out in land, which is to be held on trusts which (either originally or by lapse) leave *part* of the interest undisposed of, this partial interest results to the testator's next of kin or residuary legatee as real estate, in case of whose death it passes to *his* heir-at-law, or devisee. (t)

(o) 1 B. C. C. 86. [See also *Clarke v. Franklin*, 4 K. & J. 257.]

(p) *Ante* p. *601.

(q) [*Chitty v. Parker*, 2 Ves., Jr., 271. And] see Sir J. Leach's judgment in *Smith v. Claxton*, 4 Madd. 493.

[(r) *Davenport v. Coltman*, 12 Sim. 610. Cf. *Bowra v. Rhodes*, 31 L. J., Ch. 676.

(s) *Carr v. Collins*, 7 Jur. 165, per Shadwell, V. C.

(t) *Curteis v. Wormald*, 10 Ch. D. 172; overruling *Reynolds v. Godlee*, Johns. 536, 582, where Wood, V. C., held that it resulted to the executor, and through him to the next of kin, as personal estate. The V. C. put the case of the liberated fund being wanted to make good abated legacies under the will, "in which case the land purchased must certainly be dealt with as the estate of the testator

On the same principle, when land is devised charged with a sum of money, which is given on trusts which do not exhaust the entire property in the money, and the undisposed of interest sinks for the benefit of the devisee, (*u*) the devisee takes it as he finds it, viz. as personalty. This, of course, assumes him to be absolutely entitled to the land.] (*x*)

*V.—It remains to examine the claim of the heir to undisposed-of sums of money constituting part of the produce of real estate devised to be sold.

Specific sums payable out of the produce of real estate belong to the heir—when.

It is clear, that a sum expressly excepted out of the produce of the sale, but not attempted to be disposed of, belongs to the heir. (*y*)

Sums excepted but not disposed of.

Nor is it to be doubted, that where a legacy is payable out of a fund of this description upon a contingency which does not happen, the residuary devisee of the fund has the benefit of such failure, on the principle that, in the event which has happened, there is no actual disposition in favor of the legatee. (*z*)

Sums given on a contingency;

Where, however, a sum of money, part of the proceeds of real estate, is in terms given to an object incapable by law of taking, the authorities respecting its destination are conflicting, though here, also, there seems to be a preponderance in favor of the heir. The cases of *Cruse v. Barley*, (*a*) *Collins v. Wakeman*, (*b*) and *Gibbs v. Rumsey*, (*c*) are all in favor of the heir; but it will be more convenient to bring these authorities distinctly before the reader in the discussion of a subordinate question connected with the doctrine. This chain of authority, however, in favor of the heir, is interrupted by *Page v. Leapingwell*, (*d*) where a testator devised certain real estate to trustees upon trust to sell, and out of the moneys arising therefrom to pay certain legacies, including two sums of £200 to the poor of two parishes; and after payment of the legacies, to apply the overplus for the benefit of certain persons. There was also a general disposition

—given to objects incapable of taking.

which the executors must apply as personal estate in payment of the legacies." But the case is scarcely relevant. Nothing of course results to the next of kin until all the purposes of the will which ought to be satisfied have been satisfied.

(*u*) See as to this, *ante* p. *348.

(*x*) In *re Newberry's Trusts*, 5 Ch. D. 746.]

(*y*) *Collins v. Wakeman*, 2 Ves., Jr.,

683, stated *post* *638; [*Watson v. Hayes*, 5 My. & Cr. 125;] and as to trusts for conversion in deeds, see *Emblin v. Freeman*, Pr. Ch. 541; [*Griffith v. Rickets*, 7 Hare 311; *Matson v. Swift*, 8 Beav. 368.]

(*z*) *Ante* p. *345.

(*a*) 3 P. W. 20.

(*b*) 2 Ves., Jr., 683.

(*c*) 2 Ves. & B. 294.

(*d*) 18 Ves. 463.

of the residue of his real and personal estate, not thereinbefore disposed of. Sir W. Grant, M. R., observed that the disposition as to the £200 was void as a devise to charity, and therefore lapsed.

According to the decree, however, his Honor appears to have decided, that the £200 went, not to the heir, (as might have been inferred from the observations in his judgment,) but to the general residuary devisee; a conclusion which it seems difficult to reconcile with the principle discussed in the next chapter, and repeatedly laid down by Lord Eldon and other judges, that a residuary devise is, under the old law, in effect, a specific devise of the lands not included in the particular devises contained in the will. It is enough, however, for our present purpose to *show, that in *Page v. Leapingwell*, the void legacies bequeathed out of the real fund did not go to the residuary devisee of that fund. In this respect it agrees with, and is confirmed by, *Jones v. Mitchell*, (e) where A devised his real estate, after certain limitations, to trustees in trust to be sold, and out of the moneys to be produced by the sale, to pay certain legacies, and then a legacy of £800 to charities, and to pay the residue to B; Sir J. Leach, V. C., held that the void legacy of £800 belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

The principle of the two preceding classes of cases seems to apply, with exactly the same force, to the case of lapse; and, undoubtedly, at one period, the established rule as to these cases also was, that the heir was entitled on failure of the devise; unless, according to the doctrine of some cases, (f) the produce of the sale was blended with the personal estate in one general residuary disposition.

The ground upon which this rule was established, (and the principle is equally applicable to every class of cases before noticed,) is this: that where a testator devises real estate to be sold, and out of the produce gives a specific sum, say £1000, to A, and the residue to B, the residue is to be considered as a gift of the specific sum which the purchase-money, after deducting £1000, shall happen to amount to; the gift being the same in effect as if the testator had said, I give to B the purchase-money minus £1000, which I give to A. It is a mere distribution of the purchase-money among them, the one

(e) 1 S. & St. 290.

Kennell v. Abbott, 4 Ves. 802; but as to

(f) See Lord Thurlow's judgment in which see *post*.

Hutcheson v. Hammond, 3 B. C. C. 148;

taking a certain and the other an uncertain share ; and B has no more right, *in any event*, to take the share of A, than A has to take the share of B.

Thus, in *Hutcheson v. Hammond*, (g) A devised certain lands to trustees to sell, and invest the money produced by the sale in the funds, in trust for H. for his life, and after his decease to pay certain sums of money, including £1000 to G. P. ; then in trust to pay all the residue of the said principal money and interest to B. and C. ; and she gave the residue of her personal estate to H. G. P. died in the lifetime of the testatrix ; and Buller, J., sitting for Lord Thurlow, held, after much argument, *that the lapsed sum did not fall into the particular or the general residue, but went to the heir. He said, here there was no apparent intention against the heir : therefore the general rule must take place, that the money is considered as land, and, if it lapsed, belonged to the heir-at-law. This decision was affirmed, on a re-hearing, by Lord Thurlow, (h) who observed, that the testatrix having said nothing as to the £1000, the heir was not defeated. *The merely directing an appropriation of a part would not defeat his claim to what was not disposed of.*

Claim of the heir supported by *Hutcheson v. Hammond*.

This case was considered to have fixed, beyond controversy, the rule of law upon this subject, having been acquiesced in for upwards of thirty years, and received reiterated confirmation in the several analogous decisions of *Collins v. Wakeman*, *Gibbs v. Rumsey*, and *Jones v. Mitchell*. The reader, therefore, will be not a little surprised to find a different doctrine unhesitatingly propounded in a subsequent case, (i) which was as follows :—Lord W. devised certain real estates to trustees, upon trust for sale, and out of the produce to pay certain sums of money, including a sum of £5000 to his wife, her executors and administrators, in part satisfaction of £10,000 secured to her by their marriage settlement out of certain trust funds in case of her surviving him and failure of issue of his body by her ; (k) and after these purposes he directed the trustees to invest the residue of the said moneys upon certain trusts. The tes-

Claim of the heir negatived in *Noel v. Lord Henley*.

(g) 3 B. C. C. 128.

(h) 3 B. C. C. 148.

(i) *Noel v. Lord Henley*, 7 Pri. 241, Dan. 211, 322.

(k) If the devise could have been considered as subject to this contingency, there would be no difficulty in reconciling the decision with *Hutcheson v. Hammond*,

on the principle before stated in regard to contingent charges, *ante* p. *345. It seems to be impossible, however, consistently with sound construction, or the principle upon which it was decided, so to treat it. [See, however, Lord Eldon's remarks on the appeal, cited next page.]

tator's wife died in his lifetime. One question was, whether the £5000 devolved upon the heir or next of kin, or belonged to the persons entitled to the residue. Richards, C. B., after taking a distinction between legacies and debts, (*l*) the former of which, he thought, were raisable out of the real estate only, and the latter out of the realty in aid of the personal estate; and, treating the gift of £5000 as *belonging to the former class*, held, that by the lapse the residuary devisees of the fund were entitled.

There is a singular discrepancy in the several parts of the C. B.'s judgment. In one place, he treats the devised sum as a debt, and as such, chargeable on the real estate in aid of the personalty; observing, that "you might as well say that all the **other* debts which are thrown on the real estate, in case the personalty will not pay them, are so many trusts for the heir-at-law: such a doctrine was never heard of." And yet he afterwards says, that, "with respect to the £5000 to Lady W., *that is excluded out of the personal estate, and I should think would, if she had lived, have been raisable out of the real estate only.*"

The decree as to the £5000 was affirmed in D. P. (*m*) Lord Redes-
Observations upon the judgment in the Exchequer.
Noel v. Lord Henley affirmed in D. P. Lord Redesdale's reasoning.
 dale said, "If any property is given by a will in the nature of a legacy to a person in being at the time the will is made, but who dies before the testator, that legacy of course becomes lapsed and no longer payable. That is a contingency to which every person who makes a disposition by will must be deemed to know that such a disposition is subject; and, although it is contended, on the part of the heirs-at-law, that this £5000 arising out of the sale of the estate should be applied to their benefit as so much real estate undisposed of by the will, I conceive that that is not the true construction of the will; because, having given that £5000 as a legacy, which in its nature must be subject to that species of contingency, that contingency is one which he must be supposed to have looked to for the benefit of those persons to whom he gave the residue of the money to arise from the sale of the estate: and, therefore, it seems to me that the decree is perfectly right in the manner in which it has disposed of that question, by holding that that £5000 is not to be raised out of the money which may be raised by sale of the real estate, inasmuch as that contingency has happened to which the testator

(*l*) As to which, see *post* ch. XLV.

(*m*) Noel v. Lord Henley, 1 Dan. 322.
 [12 Pri. 213.]

is supposed to have looked at the time he made the will." Lord Eldon [concurred in the decree, but apparently on a different ground; for he said (using the word "contingency" in a different sense, as it seems, from Lord Redesdale) that the £5000 was only to be payable upon a contingency; and that not having happened, no direction was given, the will having failed with reference to that part of it.]

The reasoning which regards the death of the devisees in the testator's lifetime as an event within the testator's contemplation, on which Lord Redesdale grounded his opinion, is directly opposed to the principle recognized in a great variety of cases, (*n*) that a testator is in general supposed to calculate upon his dispositions taking effect, and *not* to provide for the happening of events *in his lifetime which will defeat them, as the death of legatees, &c. The whole doctrine of lapse stands upon this principle.

Remarks upon
Noel v. Lord
Henley.

It is most extraordinary that none of the judges who decided *Noel v. Lord Henley* cite or allude to *Hutcheson v. Hammond*, (*o*) whose authority they were subverting; and we are left to conjecture whether their decision was made in ignorance or with the intention of overturning that case. Fortunately, however, the perplexing uncertainty in which the doctrine was thus placed, is in some degree dissipated by the subsequent case of *Amphlett v. Parke*, (*p*) presently stated, which, as eventually decided, appears to have restored the authority of *Hutcheson v. Hammond*. Lord Brougham's judgment, on the appeal, contains a detailed examination of many of the cases, among which, however, neither *Hutcheson v. Hammond*, nor *Noel v. Lord Henley*, is to be found, nor do they appear to have been cited at the bar. Indeed, the question chiefly discussed in this case was, whether the declaration that the produce of the sale should be deemed personal estate, and the blending of such produce with the general residuary personal estate, did not so absolutely convert it into personal estate as to exclude the heir; and the adjudication in the negative affords the strongest possible confirmation of the doctrine of *Hutcheson v. Hammond*, in opposition to *Noel v. Lord Henley*, in both which these circumstances were wanting.

The unavoidable mention of *Amphlett v. Parke* has rather antici-

(*n*) See accordingly *Robinson v. London Hospital*, 10 Hare 28.

Prop., p. 363, as being overruled by *Noel v. Noel*.]

(*o*) But it was cited *arg.* in *D. P.*, 12 Pri. 258, and is referred to, *Sug. Law of*

(*p*) 4 Russ. 75, 2 R. & My. 221.

Whether blending of proceeds of real and personal estate excludes the heir.

patented the subject next to be considered, namely, whether the circumstance of the produce of the real estate being blended with the general personal estate constitutes a ground for excluding the heir, by applying to the mixed fund the rule applicable to the latter species of property; such rule being (as is well known) that the residuary legatee takes, even under the old law, whatever is not effectually disposed of to other persons. It seems difficult to discover any solid reason why the blending of the two funds should produce this consequence. The testator, intending the proceeds of the two species of property to go in the same manner, comprising them in the same disposition for mere convenience, and to avoid a needless repetition of language; and the effect ought, one should think, to be the same as if, in one part of his will, he had given the proceeds of the real estate *to A, and in another part, the proceeds of the residuary personal estate to A. How far the authorities lend their support to such a conclusion, will be seen by the following statement of them.

A leading case on this subject is *Cruse v. Barley*, (g) where a testator devised all his freehold and copyhold lands to P. and his heirs, in trust to sell the same, and, in the first place, to pay off all encumbrances upon the premises, and all his just debts. He devised all his personal estate to the same trustee, in trust to sell, and to apply the money arising by the sale, *and also the money to be produced by sale of the real estate*, amongst his five children: viz. to his eldest son C. £200 at his age of twenty-one: the residue amongst his four younger children at their respective ages of twenty-one or marriage. C. died under twenty-one; upon which a question arose as to the £200, which, it was admitted, never vested in C. Sir J. Jekyll, M. R., having ordered the precedents to be looked into, declared that the £200 should be construed as land, and descend to the heir: for that it was the same as if so much land as was of the value of £200 was not directed to be sold, but suffered to descend.

The legacy in this case was contingent, and failed by the non-happening of the event on which it depended; a circumstance which was not adverted to, but which would clearly now be held to take it out of the principle in question. (r) It is enough, however, for the present purpose, that the heir was not excluded by the blending of the residue of the fund with the personal estate.

Remark on
Cruse v. Barley.

(g) 3 P. W. 20.

(r) See *ante* pp. *345, *632, and *Doe d. Wells v. Scott*, 3 M. & Sel. 300; the prin-

ciple of which is, of course, applicable to devises out of the produce of real estate devised to be sold.

The next case is *Durour v. Motteux*, (s) where a testator devised all his estate, consisting in a freehold and leasehold, moneys, securities, (specifying many other species of personal property,) and all he had or might have, of what kind soever, to trustees to sell; and, after payment of all his debts, funeral expenses, and legacies, to place out all the residue of his personal estate at interest, upon securities, upon the trusts therein mentioned. One of the questions was, whether a legacy of £1200, which was void, (because to be laid out in land for charitable purposes,) belonged to the heir or the residuary legatee. Lord Hardwicke decided in favor of the legatee; laying some stress upon the fact of the real estate being turned into personal, and observing, that the intent to include the whole in the residue plainly appeared from *the testator's description of *all* his personal estate; so that the whole of the real was to be considered as personal property. (t)

Durour v. Motteux.

Residuary legatee held to be entitled to void legacy.

In this case (which has been regarded as a leading authority) we find, for the first time, the circumstance of the blending of the produce of the real and personal estates was made the ground of the decision; and this principle was still more distinctly recognized in the subsequent case of *Hutcheson v. Hammond*, (u) where Lord Thurlow, while deciding in favor of the heir's title to a lapsed legacy, payable out of the proceeds of real estate, added "though, if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of."

Dictum of Lord Thurlow, in Hutcheson v. Hammond.

No allusion to any such doctrine, however, occurs in *Collins v. Wakeman*, (x) (the next case of this class,) where a testator devised certain lands to W., his heirs and assigns, in trust to sell; and the money arising from such sale he directed to be considered as part of his personal estate, and to be disposed of by his said trustee and executor, his

Collins v. Wakeman.

Heir held to take legacy excepted out of proceeds of land, but not disposed of.

(s) 1 Ves. 320; more fully and accurately stated, 1 S. & St. 292, n.

(t) Of this case, Sir W. Grant has observed, "From the little Lord Hardwicke is reported to have said, it is difficult to ascertain from what expressions he inferred that, by the description of all his personal estate, the testator meant to include everything in the residue. The decision is generally accounted for by the

particular manner in which the sale was directed, and the circumstance of the testator having blended the real and personal estates in one gift to trustees, to sell the *whole* with his personal estate," &c., 1 Ves. & B. 417; see also 2 R. & My. 232; but see *Id.* 245.

(u) 3 B. C. C. 148, stated *ante* p. *633.

(x) 2 Vés., Jr., 683.

heirs, executors, and administrators, in manner following. He then gave several pecuniary legacies out of his said trust moneys and personal estate, and gave to his executor W. the sum of £1000, to be disposed of according to any instructions he might leave in writing. The testator then gave all the residue of his goods and chattels, personal estate and effects whatsoever and wheresoever, subject to debts, legacies and funeral expenses, costs of his will and of W., whom he also appointed executor, to M., her executors, administrators and assigns. The testator left no instruction as to the £1000, which was now claimed by the residuary legatee, the next of kin, and the heir-at-law. Lord Loughborough decided in favor of the heir; observing, that, "where the court has no direction from the testator, to whom the money arising from any part of his real estate shall go, it rests with his heir-at-law." (y)

In this case, it will be observed, the express declaration, that *the produce of the sale should be considered personal estate, did not, in Lord Loughborough's opinion, authorize the court to apply to the produce of the real estate the rule applicable to personalty in reference to the effect of the failure of a specific gift.

This case was soon followed by *Kennell v. Abbott*, (z) where a testatrix devised a certain copyhold estate to A and her heirs, in trust to sell, and out of the moneys arising therefrom to pay certain legacies; she then made some specific bequests; and, as to the residue of the purchase-money arising from the sale of the said estate, household goods, and all the residue of her moneys, securities for money, personal estates and effects whatsoever, she gave to B, her executors and administrators, subject to her debts and funeral expenses; and she appointed B executrix. One of the legacies payable out of the produce of the land was void on account of fraud in the legatee; which raised a question, whether it belonged to the residuary legatee or the heir. Sir R. P. Arden, M. R., held, that it devolved to the residuary legatee. He distinguished *Hutcheson v. Hammond*, on the ground of there being two residues—a special residue of the money arising from the sale, and the general residue; but that here the testatrix had given particular parts of her estate, stock, leasehold estate, household goods, furni-

Remark on Collins v. Wakeman.

Residue of real fund being blended with the personalty, void legacy held to fall into residue.

(y) In *Amphlett v. Parke*, 2 R. & My. 221, Lord Brougham treated *Collins v. Wakeman* as a case in which the next of kin and the heir-at-law were the only

litigating parties; but, according to the printed report, the residuary legatee also claimed.

(z) 4 Ves. 802.

ture, and many other articles, and this copyhold estate, which she ordered at all events to be sold, and out of the purchase-money she directed these legacies to be paid; and she made a residuary disposition, "as to which," continued his Honor, "the question is, whether it is not, to all intents, a general residuary clause, carrying everything not disposed of. I am of opinion it is, under *Mallabar v. Mallabar*, and *Durour v. Motteux*. It is making the real estate, to all intents and purposes, personal; and then, taking a retrospective view of what she had done, and meaning to give everything not disposed of, she adds this residuary clause. Therefore, I think this estate is turned entirely into money."

This case seems to have occasioned much of the uncertainty in which this doctrine has been long involved by contradictory decisions. It was certainly founded on a very partial view of the then state of the authorities, as neither *Cruse v. Barley*, nor *Collins v. Wakeman* was noticed by the M. R., though the latter case was the latest upon the subject; having been decided only a short period before, by his contemporary on the Equity Bench.

*We now come to *Gibbs v. Rumsey*, (a) where a testatrix devised her freehold, copyhold and personal estates to trustees, upon trust to sell, and out of the money to arise by the sale, together with her ready money and other effects, she bequeathed certain charitable legacies, and £100 to her trustees for their care and trouble. And she afterwards bequeathed the residue of the *moneys arising from the sale*, and all the residue of her *personal estate*, to her trustees and executors to dispose of as they should think proper. It was held, that these trustees took the residue for their own benefit under this bequest; and, with respect to the charitable legacies, Sir W. Grant treated it as a point quite clear, that they went to the heir-at-law, and not to the residuary legatee or next of kin. The principal question in the case was, whether the devisees were trustees of the surplus or not; (b) and it is observable that the point, as to the destination of the void legacies, does not appear to have been discussed; nor was *Kennell v. Abbott* cited, or a single argument advanced in favor of the residuary legatees.

The subject, however, was much more fully investigated in the subsequent case of *Amphlett v. Parke*, (c) where A devised freehold and copyhold lands to M. and P., upon trust for

Remark on
Kennell v. Ab-
bott.

Gibbs v. Rum-
sey.

Heir held to
take void lega-
cies.

Observation
upon *Gibbs v.*
Rumsey.

Amphlett v.
Parke.

(a) 2 Ves. & B. 294.

(b) *Ante* p. *384.

(c) 1 Sim. 275, 4 Russ. 75, 2 R. & My.
221.

sale, and directed that the moneys to arise from such sale should be considered as *part of her personal estate*; and then went on to direct, that, out of the moneys to arise from the sale, and all *other* her personal estate, certain legacies should be paid, and all the residue of her personal estate, and the moneys arising from her real estate, the testatrix gave upon certain trusts. Sir J. Leach, V. C., held, that some of the legacies which had lapsed fell into the residue. He observed, that the two first passages of the will purported an intention that the moneys arising from the sale should be considered as personal estate at the testatrix's death; but the latter passages pointed the other way;

Heir held to
take void lega-
cies.

and it was only from deference to *Durour v. Motteux*, and *Mallabar v. Mallabar*, that he came to the conclusion in

this case, that the testatrix had in her view the improbable intention, that the moneys arising from the sale of her real estate should, for purposes not foreseen by her, have the same qualities as if, at her death, they had been part of her personal estate. On a re-hearing, he continued of his former opinion; but his judgment was reversed by *Lord Brougham, who decided in favor of the heir, after an elaborate examination of many of the authorities.

The only case which his lordship seemed to consider to press strongly

Lord Brough-
am's judg-
ment in *Amph-
lett v. Parke*.

against the heir was *Kennell v. Abbott*, which he deemed to be inconsistent with the current of authority, especially

Cruse v. Barley, *Digby v. Legard*, (*d*) and *Gibbs v. Rumsey*, and to have been founded on a misconception of *Durour v. Motteux*, in the report of which in *Vesey* the will was not accurately stated, and the decision appeared from a MS., in his possession, of Lord Hardwicke's judgment, to have chiefly turned on another question. Lord Brougham regarded *Mallabar v. Mallabar* as standing on special grounds, especially that of a legacy being given to the heir-at-law, but which circumstance has not invariably, we have seen, (*e*) been considered to be of so much weight. In that case, however, the question, as already shown, (*f*) was not, as to the destination of a lapsed

(*d*) *Digby v. Legard*.—3 P. W. 22, Cox's note, 2 Dick. 500. A devised her real and personal estate to trustees, in trust to sell, to discharge debts and legacies, and to pay the *residue* to five persons in equal shares. One of them died before the testatrix, and Lord Bathurst held, that the share of the deceased *residuary*

legatee in the real estate resulted to the testatrix's heir. The case, therefore, does not appear immediately to belong to the class of authorities discussed in the text, but ranks with *Ackroyd v. Smithson*, stated *ante* p. *621.

(*e*) *Ante* p. *567.

(*f*) *Ante* p. *630.

or void legacy given out of the proceeds of real estate ; *but whether such proceeds passed under a general residuary disposition.*

It will be observed that, in several of the preceding cases, including *Gibbs v. Rumsey*, and *Amphlett v. Parke*, the *entire* proceeds of the real estate, (not merely, as in *Kennell v. Abbott*, the surplus, after payment of the legacies in question,) were blended with the personalty, the legacies being charged on such mixed fund ; so that the fact of the void or lapsed legacy being made payable out of the personal, as well as the real estate, was not considered to afford a ground for applying to such legacies, *in toto*, the rule applicable to personal estate.

In the interval between the original decree in *Amphlett v. Parke* and its reversal, occurred the case of *Green v. Jackson*, (g) Green v. Jackson. where a testator bequeathed all his personal estate to trustees, upon trust to pay some legacies, and also devised all the residue of his real estate (after some particular devises) to the same trustees, their heirs and assigns, upon trust to sell. The testator then directed, that the moneys which should be received by his trustees by such sale, and by virtue of the bequest of the personalty, and all other his moneys which should come to their hands, after his debts and legacies, and two sums directed to be sunk by way of annuity, and all costs attending the execution of the will should be Void legacies held to fall into residue. paid and provided for, should be placed in a banking-house until the whole (except certain sums) should be got in. He then directed his trustees to pay considerable sums for charitable purposes, and concluded with a direction to them to pay and apply all the residue of the moneys in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests, to certain persons. It was admitted that the charitable legacies failed in the proportion which the produce of the real estate bore to the produce of the personalty. (h) The heir-at-law claimed the benefit of such failure ; but Sir J. Leach, M. R., on the authority of *Durour v. Motteux*, and also, he said, upon principle, held that the failure of the charitable legacies enured for the benefit of the residuary legatees ; and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate : he observed that the facts in *Gibbs v. Rumsey* were not distinctly stated,

(g) 5 Russ. 35, 2 R. & My. 238.

(h) On this subject, *vide ante* p. *235.

and the argument there turned on another point. He did not advert to the other opposing authorities.

Green *v.* Jackson was referred to by Lord Brougham in *Amphlett v. Parke*, as warranted by the particular terms of the will ; but as his remarks went to impugn the authority of *Durour v. Motteux*, on which it was chiefly founded, they probably induced the appeal which was brought against the decision of the M. R., and which was argued before Lord Lyndhurst, who, however, affirmed the decree, and that, too, chiefly on the authority of *Durour v. Motteux*. The circumstance that, in *Green v. Jackson*, the legacy was void *ab initio*, and in *Amphlett v. Parke* failed in event by lapse, seems to furnish no solid distinction between these cases ; for the principle applicable to each species of case is, it is conceived, the same.

[The last case on this subject appears to be *Salt v. Chattaway*, (i) in which a testator devised and bequeathed to trustees all his real and personal estate, "subject to the payment thereof of his just debts, funeral and testamentary expenses," upon trust to sell and receive the purchase-money and all money that might be owing to him at his decease, "and thereout and out of the *ready money he might die possessed of to pay, among other legacies, a legacy of £100 to A *when he should attain the age of twenty-one*, and to divide the residue into three parts, which he then proceeded to dispose of. A died under twenty-one, in the testator's lifetime : the contingency upon which the legacy was given thus never happened. According to the principle before stated, (k) this would seem to have been the natural ground for holding that the legacy fell into the residue. Lord Langdale, however, passed over this ground : he said, "It is not easy to reconcile all the cases which are to be found in the books on these subjects ; and the question, whether the lapsed pecuniary legacy passes by the gift of residue or ought to be considered as undisposed of, appears to me to be attended with more doubt than the other : but considering, however, that the conversion of the real estate must be deemed to have been made for all the purposes of the will, and that besides the intention to give a legacy of £100 to A, there was also an intention to dispose of the residue after payment of the legacies ; that the testator had determined the qualities of the property which his legatees were to take ; and that the gift of the residue is made in terms to give the residuary legatees of personal estate the benefit of lapsed

[(i) 3 Beav. 576.

(k) *Ante* pp. *345 and *632.]

legacies, it appears to me that the proper course is to follow the decisions of *Durour v. Motteux* and *Green v. Jackson*, and, in conformity with those cases, I am of opinion that the lapsed legacy of £100 must be held to have fallen into the residue and to have passed by the gift of the residue.”]

Here, then, closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where *such proceeds are blended with the general personal estate*. The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of *all* the cases is still wanting.

The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the act 1 Vict., c. 26, § 25, to extend to all *interests* in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but *the remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted; (l) to which it [should be added that when the sum is a charge, as distinguished from an exception, the failure still (as before the act) enures for the benefit of the specific devisee, not of the residuary devisee.](m)

(l) *Ante* p. *351.

[(m) *Tucker v. Kayess*, 4 K. & J. 339, (will dated 1853); *Sutcliffe v. Cole*, 3 Drew. 135, (will dated 1843, 24 L. J., Ch. 486.) And see the judgment in *Carter v. Haswell*, 26 L. J., Ch. 576, where it was

immaterial whether charge or exception; the general (being the only) devisee could alone benefit by the failure. The case is more properly one of void particular devise falling into residue.]

[*644]

*CHAPTER XX.

OPERATION OF A GENERAL DEVISE OF REAL ESTATE.

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| I. <i>In regard to void, lapsed and partial</i> | III. <i>In regard to Copyholds.</i> |
| <i>specific Devises.</i> | IV. ————— <i>Leaseholds.</i> |
| II. ————— <i>Reversions.</i> | V. ————— <i>Powers of Appointment.</i> |

I.—A residuary bequest, it is well known, operates upon all the personal estate of which a testator is possessed at the time of his death, and, consequently, includes all specific legacies which are void, or fail by the death of the legatee in the testator's lifetime; (a) and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest, in terms embracing the "residue," should become, in event, a gift of the whole. But as under the old law (which still applies to all wills made before 1838, whatever be the period of the testator's decease,) a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific; (b) being in fact a specific disposition of the lands not before given, or, to speak more accurately, not before *expressed to be given* by the will. Thus, if a testator, being seized of Blackacre and Whiteacre, and having no other real estate, devise Blackacre to A in fee, and all the rest of the lands to B, B takes exactly that which he would have taken under a specific devise of Whiteacre and no more; and, consequently, if the devise to A fail, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B can no more take, by virtue of his residuary devise, the interest so given, or intended to be given, to A, than he could have done under a specific

(a) *Brown v. Higgs*, 4 Ves. 708; *Shanley v. Baker*, Id. 732; *Jackson v. Kelly*, 2 Ves. 285. *Howe v. Earl of Dartmouth*, 7 Ves. 147; *Broome v. Monck*, 10 Id. 605; *Hill v. Cock*, 1 Ves. & B. 175; *Spong v. Spong*, 1 Y. & J. 370.

devise of another property. (c) Nor is this pro*position at all shaken by the rule (presently discussed,) that a residuary disposition of real estate will carry all the contingent or reversionary interest which a specific devise may leave undisposed of; since it is clear, upon the very same reasoning, that, in such a case, the residuary disposition is to be read as a specific devise of the interest not comprehended in the former devise.

In the application of this principle to the case of lapsed devises, the writer is not aware of any opposing decision since *Goodright v. Opie*, (d) where the judges were equally divided on a question, whether the share of one of several tenants in common in fee, dying in the testator's lifetime, belonged to the heir or residuary devisee. The point was afterwards settled in favor of the heir, in the cases of *Wright v. Hall*, (e) and *Roe v. Fludd*; (f) in the latter of which the two judges, who had been of a contrary opinion in *Goodright v. Opie*, concurred. (g)

Its operation
in regard to
specific lapsed
devises;

The principle, however, as applied to devises void *ab initio*, seems to be encountered by some observations which fell from the Court of K. B. in *Doe d. Stewart v. Sheffield*. (h)

—and specific
devises void
ab initio.

The testator devised certain premises to the sisters of H., as tenants in common in fee; and, by a subsequent clause, he devised to S. certain other real estates, and all his other lands and hereditaments, whatsoever and wheresoever the same might be, which he was in any manner entitled to or interested in, *and not thereinbefore disposed of*, to hold to him, his heirs, &c. There had been three sisters of H., but, at the date of the will, only one was living, who, therefore, was clearly entitled to the whole, she being the sole representative of the class, and the court so decided; but, in delivering his judgment, Lord Ellenborough said, "But even if S. (*i. e.* the surviving sister) were not entitled to take the whole, the heir-at-law could not be entitled to any part of the residue undisposed of; for this is not the case of a lapsed legacy, but the residuary devisee is to take all

*Dictum in Doe
v. Sheffield ex-
amined.*

- (c) *Goodright v. Opie*, 8 Mod. 123; *Mitchell*, 1 S. & St. 290.
Wright v. Hall, Fortesc. 182; S. C., *nom.* (d) 8 Mod. 123.
Wright v. Horne, 8 Mod. 224; *Roe v.* (e) Fort. 182; S. C., *nom.* *Wright v.*
Fludd, Fort. 184; *Sprig v. Sprig*, 2 Vern. *Horne*, 8 Mod. 224.
 394; *Doe d. Morris v. Underdown*, Willes (f) Fort. 184.
 293; *Watson v. Earl of Lincoln*, Amb. (g) Willes 299.
 325; *Oke v. Heath*, 1 Ves. 141; *Cam-* (h) 13 East 527.
bridge v. Rous, 8 Ves. 25; *Jones v.*

other his lands, hereditaments, and premises, whatsoever and wheresoever, *not thereinbefore disposed of, &c., and all other his real and personal estate whatsoever*, in the most comprehensive terms. Then, admitting the law to be as stated in the cases cited on the part of the heir-at-law, with respect to lapsed legacies, this is not a lapsed legacy." Le Blanc, and Bayley, JJ., both concurred in this doctrine; the former, however, appearing to think the case stronger in favor of the residuary devisee, without the words "not before disposed of," though he thought him entitled either way. (*i*)

It is clear, therefore, that, had *all* the devisees been dead at the time of making the will, the court would have held the residuary devisee to be entitled. Such a doctrine seems to be irreconcilable with the principle already adverted to, which teaches that a residuary devise is a specific disposition of whatever the will does not purport to dispose of, as exemplified in the case of lapsed devises, between which and the case of a void devise there seems to be no substantial distinction; for the testator conceives himself to have disposed of the property comprised in the void devise, and, therefore, does not intend the residuary devise to extend to it. It is moreover inconsistent with the decisions discussed in the last chapter, in which specific sums given out of real estate devised to be sold, and which were void *ab initio*, have been held to belong to the heir, and not to the residuary devisee of the fund. (*k*)¹

But it must be observed, that, if the specific devise comprise only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such

Operation of a residuary devise considered;
—in relation to partial and contingent devise;

[*i*] *Williams v. Goodtitle* d. David, as reported 10 B. & Cr. 895, seemed to favor this doctrine; but that report is incorrect, see *ante* p. *201, n.]

[*k*] *Jones v. Mitchell*, 1 S. & St. 293; see also *Cruse v. Barley*, 3 P. W. 20; *Collins v. Wakeman*, 2 Ves., Jr., 683; *Gibbs v. Rumsey*, 2 Ves. & B. 294, all stated *ante*. ["The rule is, where the intention of the testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event;" per Lord Camden, *Gravenor v. Hallum*, Amb. 645, *ante* p. *347.

Wood, V. C., felt "some difficulty in reconciling *Doe v. Sheffield*" with this rule, *Smith v. Lomas*, 33 L. J., Ch. 582, and gave no countenance to the distinction suggested by *Romilly, M. R.*, in *Garnier v. Hannyngton*, 22 Beav. 627, between a devise (as in that case) of "all other my real and personal estate" and one (as in *Doe v. Sheffield*) of "property not hereinbefore disposed of."]

1. As to lapsed and void devises falling into the general residue or going to the heir, see ch. XI., note 8.

undisposed-of interest will, even in a will made before 1838, pass by a general residuary devise.

Thus, where a person, by such a will, devised certain lands to A for life or in tail, and the residue of his lands to B and his heirs; B, under this devise, took the reversion in fee not included in the devise to A; (l) and, consequently, if A died in the lifetime of the testator, he became, at the testator's death, tenant in fee in possession.

So, where a testator devised that A and his heirs should sell *his lands for payment of debts or other purposes, not exhausting the whole beneficial interest, and devised the residue of his real estate to B; the latter devise carried the beneficial interest not comprised in the former. (m)

The same doctrine, it is clear, applied to executory and contingent devises in fee; for if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternative fee depending on the converse event is undisposed of, and, therefore, is an interest on which the residuary clause will operate. 2 Thus, if a testator devised, in case his personal estate should be insufficient to pay his debts, (n) certain lands to A and his heirs, in trust to sell and pay them, and devised the residue of his estate to B; the devise to B carried the legal fee, in the event of the personal estate being sufficient to pay the debts. (o)

So, (p) if a testator devised real estate to A for life, remainder to

(l) *Wheeler v. Waldron*, Allen 28, 3 P. W. 63, n.; *Cooke v. Gerrard*, 1 Lev. 212; *Rooke v. Rooke*, 2 Vern. 461, 1 Eq. Cas. Ab. 210, pl. 17; *Willows v. Lydcot*, 2 Vent. 285, 3 Mod. 229; see also *Doe d. Briscoe v. Clarke*, 2 B. & P. N. R. 343; *Bennett v. Lowe*, 7 Bing. 535, 5 Moo. & P. 485; [*Saumarez v. Saumarez*, 4 My. & C. 331.]

(m) *White v. Vitty*, 2 Russ. 484, 4 Russ. 584; see also *Goodtitle d. Hart v. Knott*, Cowp. 43.

2. See *Hayden v. Stoughton*, 5 Pick. 528; *Shreve v. Shreve*, 2 Stockt. 385; *Van Kleeck v. Ref. Dutch Church*, 6 Paige 600; *Craig v. Craig*, 3 Barb. Ch. 76.

(n) But the validity of such a devise may be questioned, [unless it is to be presumed that the sufficiency or insufficiency

will be ascertained within such a time as to preclude the operation of the rule against perpetuities. In *Rimington v. Cannon*, 12 C. B. 18, a devise depending on the insufficiency of a real estate devised to executors in trust for payment of debts, was held good, the presumption being that the question of sufficiency would be ascertained within one year after the testator's death. It is scarcely necessary to observe that this is a different question from that mentioned *post* ch. XXV., § 2, *ad fin.* and discussed *Lewis Perpet.* 622-638, namely, whether a devise *after payment* of debts is good.]

(o) *Goodtitle d. Hart v. Knott*, Cowp. 43.

(p) *Willes* 300; *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186.

—contingent
devises in fee. A's children living at his decease in fee, and the residue of his lands to B, it is clear, that, if A died, either in the testator's lifetime or after his decease, without leaving a child surviving him, B would be entitled under the residuary devise.

In *Doe d. Wells v. Scott*, (q) a testator devised certain lands to A and his heirs, provided that he or his heirs did, within six months after his the testator's death, convey a certain copyhold estate to B and his children; and, in default, he gave the said lands to B for life, remainder to his children living at his decease, and their heirs, as tenants in common; and the testator devised all the residue of his lands to C and D, their heirs and assigns as tenants in common. A and B both died unmarried in the testator's lifetime. It was held, that the specific devise was incomplete as a disposition of the whole absolute fee, *inasmuch as it did not dispose of the interest, which remained to be disposed of if A should not assure the copyhold estate to B, and B should die without children*; and the necessary consequence was, *that the interest depending on those contingencies passed by the general residuary clause. (r)

It is clear, according to the authorities, and was so assumed by the court, that, in the events which had happened, the children of B, to whom the lands were specifically devised in fee, on breach of the condition by A, would, surviving the testator and their parent, have taken fee. If, therefore, B had left children, whether they had died in the testator's lifetime or not, inasmuch as the devise to them had become absolute *in event*, the residuary devisees would clearly have been excluded, precisely in the same manner as if the devise to the children had been absolute *in its creation*. Upon the same principle, the contrary event having happened, the residuary devisees were entitled, as they would have been under a specific alternative devise expressly applied to that event.

[And a contingent remainder being an interest which has, or had, (s) an inherent liability to fail, as well through the event upon which it is limited not happening before the determination of the prior particular estate, as through its not

(q) 3 M. & Sel. 300; [see also *Vick v. Sueter*, 3 Ell. & Bl. 219.]

(r) Lord Ellenborough, in deciding *Doe v. Scott*, fully recognized the principle stated by Willes, C. J., in *Doe v. Underdown*, that, in regard to devises, the intent of a testator is to be taken as things

stood at the time of making his will; and that the residuary devise must be taken to mean the residue of the lands *then* undevised.

[(s) Before 8 and 9 Vict., c. 106, § 8, and 40 and 41 Vict., c. 33.]

happening at all, the interest, which upon a failure of the former kind is left undisposed of by the specific devise, has been held to pass by a residuary devise in the same will.] (t)

But if, after carving out a partial or contingent interest, the testator limit the reversion in fee, or the alternative fee, to his own heirs, such devise, though inoperative in law to break the descent, until the recent enactment on this point, (x) is considered to indicate an intention to exclude this property from the residuary clause; and, accordingly, such reversion devolves to the heir. (y)

Effect of devise to the testator's own heirs in excluding a reversion from a general devise.

The mere fact, however, that the devisee of the partial or contingent interest specifically devised, is also the general residuary devisee, will not exclude him from taking the remaining interest in such lands in the latter character. (z)

*[If the will contains alternative contingent remainders in fee, the reversion, if not otherwise disposed of, vests in the heir pending the contingency, and if the will contains a residuary devise will pass by it during the same period. Thus in *Egerton v. Massey*, (u) where a testatrix devised estate A to her niece for life, with remainder to her niece's children living at her death in fee, and for want of such child then to P. in fee; and gave all the residue of her estate and effects not thereinbefore disposed of to her said niece in fee: it was held that the reversion in fee which, but for the residuary devise, would have vested in the heir-at-law pending the contingency, passed by that devise to A.]

Destination of reversion during suspense of alternative contingencies.

(t) *Perceval v. Perceval*, L. R., 5 Eq. 386. *Upjohn v. Upjohn*, 7 Beav. 59, is difficult to reconcile with the general current of authority. In that case there were three contingencies; first, if a certain purchase could be and was completed; secondly, if it could not; thirdly, if it could but was not; of these the first and second were provided for; but in the opinion of the M. R. the third, which actually happened, was not: yet he held the property did not pass by the residuary devise.]

(x) 3 and 4 Wil. IV., c. 106, § 12.

(y) *Amesbury v. Brown*, cited 2 W. Bl. 739; *Robinson v. Knight*, 2 Ed. 155;

Smith d. Davis v. Saunders, 2 W. Bl. 736, Cowp. 420.

(z) *Morgan v. Surman*, 1 Taunt. 289: The position in the text is rather an inference from, than a point expressly decided in, this case; [see also *Williams v. Goodtitle d. David*, 10 B. & Cr. 895; *Saumarez v. Saumarez*, 4 My. & C. 331; *Ridgeway v. Munkittrick*, 1 D. & War. 90; *Egerton v. Massey*, 3 C. B. (N. S.) 338.

(u) 3 C. B. (N. S.) 338. A (who never had a child) executed a conveyance of the estate which, as the reversion was vested in her by the residuary devise, destroyed the contingent remainders.

[*650]

The points embraced by the preceding positions can scarcely arise under wills which are subject to the act 1 Vict., c. 26, § 25, which expressly provides, that, unless a contrary intention shall appear by the will, real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (§ 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover, (§ 24,) makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate, which takes effect, must be completely testate in regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect.

[A gift of "all other land," (a) or "all land not hereinbefore devised," (b) is a mere gift of residue, and shows no intention, within the act, to exclude lapsed specific gifts, although it gives an estate for life to the same person as is named specific devisee in fee. (c)]

What will not limit a general or residuary devise;

*On the other hand, where a testator erroneously stated that a specified part of his property belonged to A, and *therefore* gave all his property to B and nothing to A, the specified part was held to be undisposed of. (d) And where A was entitled as heir-at-law to freehold houses, of which wrongful possession was taken by another; A then died without having ever been in possession, having devised "all real estate (if any) of which she might die seized." It was held that "seized" was a purely technical word, and had no secondary or popular meaning; consequently, as A had never been seized of the houses in the technical sense, they did not pass by the devise. (e)

—what will.

And the devise of a particular residue, as of the rest of a testator's

(a) *Cogswell v. Armstrong*, 2 K. & J. 227.

(b) *Green v. Dunn*, 20 Beav. 6. See also *Culsha v. Cheese*, 7 Hare 236; *Carter v. Haswell*, 26 L. J., Ch. 576; *Burton v. Newbery*, 1 Ch. D. 241.

(c) *Green v. Dunn*, *sup.*

[(d) *Circuit v. Perry*, 23 Beav. 275. Cf. *Doe d. Howell v. Thomas*, 1 M. & Gr. 335, 344, *post* *655. And see analogous cases on exclusion from general or residuary bequests of personalty, ch. XXIII.

(e) *Leach v. Jay*, 9 Ch. D. 42.

lands in a particular parish, following a gift of a certain part in that parish, is not within section 25, which requires a proper residuary devise, *i. e.* so worded as to apply to all land of the testator that is not otherwise disposed of, and assumes that there can be only one "residuary devise" in a will. (f) A particular residue may indeed, upon failure of the gift of a part, include that part, if the testator has used language showing an intention to that effect. But such intention must be shown: whereas in the case of a proper residuary devise the act says it shall be presumed. (g)

Particular residue.

If a general residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of. As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportions: some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak,) under the residuary devise lapsed to the heir.] (h)

Effect of residuary devise failing as to aliquot share.

And here, it may be observed, that, where a specific devise is to take effect *in futuro*, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass *under the residuary clause, if any, (i) and, should the will contain no such clause, will descend to the testator's heir-at-law; (k) and it is immaterial whether the future devise in question be vested or contingent. [So] if the residuary devise itself be contingent or future, *i. e.* deferred in point of enjoyment, the income accruing in the interval from the residuary real estate [does not pass by such devise, but is undisposed of and goes to the heir.] (l) A residuary bequest of per-

Future general devise does not carry immediate income.

(f) *Springett v. Jennings*, L. R., 10 Eq. 488, 6 Ch. 333. See also *In re Brown*, 1 K. & J. 522, stated *post* § 5, *ad fin.*

(g) *Ib.*

(h) *Greated v. Greated*, 26 Beav. 621. The same rule prevails in case of personality, *Skrymsher v. Northcote*, 1 Sw. 566, *post* ch. XXIII.

(i) *Stephens v. Stephens*, Cas. t. Talb. 228; *Duffield v. Duffield*, 3 Bli. (N. S.) 621, [1 Dow & Cl. 395; (nor would this result have been varied by the residue

being devised upon trust for sale, *Ib.*); *Holmes v. Prescott*, 10 Jur. (N. S.) 507, 33 L. J., Ch. 264; *In re Mowlem*, L. R., 18 Eq. 9, (gift to child *en ventre*.)

(k) *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Bullock v. Stones*, 2 Ves. 521; [*Wills v. Wills*, 1 D. & War. 439.

(l) *Hopkins v. Hopkins*, Cas. t. Talb. 44, extr. from R. L. Hawkins, *Construction of Wills*, App. I.; *Hodgson v. Bective*, 1 H. & M. 376, 10 H. L. Cas. 656, (but not appealed on this point.)]

sonalty, it is well known, does (though contingent in its terms) carry the prior income. (m) [And the distinction between real and personal estate has been said to flow from the very nature (under the old law) of a residuary devise; for being confined to what the testator had when he made his will, it was as specific as if the property was particularly described. (n) It is still more clearly deducible from the rule of law that the freehold cannot be in abeyance. (o) And the profits necessarily go with the estate. (p) It is impossible, in the absence of any words clearly leading to what the court considers judicially to imply a gift of the intermediate rents, (q) that any such gift can be introduced into the testator's will. Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into *esse* when the executory devise has taken effect, nor all the persons who may be interested under the series of devises following that executory devise, by way of accumulation (of the rents) can establish their claim. (r) And the rule is the same with regard to trusts. (s)

*But if] the real and personal estates are blended in one gift, it is considered to denote an intention that both species of property shall be subject to the rule applicable to personalty. Thus in *Genery v. Fitzgerald*, (t) Lord Eldon decided that

Otherwise if
real and per-
sonal estate are
blended in
same devise.

(m) *Green v. Ekins*, 2 Atk. 472; *Trevanion v. Vivian*, 2 Ves. 430; [*i. e.* until accumulation is stopped by the law: thenceforth it goes to the next of kin, *Bective v. Hodgson*, 10 H. L. Cas. 656, 671; *Wade-Gery v. Handley*, 1 Ch. D. 653, 3 Id. 374. And it makes no difference that the personalty or an aliquot share of it is to be laid out in realty: the *interim* income is still income of personalty, and follows the trust of the *corpus*, *Bective v. Hodgson*, *sup.*] But a future specific bequest does not carry income, *Wyndham v. Wyndham*, 3 B. C. C. 57; *Shaw v. Cunliffe*, 4 B. C. C. 144; 2 Rop. Leg. by Wh. 276.

[(n) By Wood, V. C., 1 H. & M. 396.

(o) See acc. per Lord Westbury, 10 H. L. Cas. 665.

(p) 1 Atk. 424, 2 Atk. 476, Co. Lit. 55 b, n. (8).

(q) For examples of such a gift in a

shifting clause, see *Turton v. Lambarde*, 1 D., F. & J. 495; *D'Eyncourt v. Gregory*, 34 Beav. 36.

(r) Per Wood, V. C., 1 H. & M. 392; and see Sir E. Sugden's remarks in *Wills v. Wills*, 1 D. & War. 451, 452, upon *Duffield v. Elwes*, 2 S. & St. 544; and *ante* p. *575. *Sidney v. Wilmer*, 4 D., J. & S. 84, *contra*, is not law, 3 Ch. D. 374.

(s) Per Lord Talbot, *Hopkins v. Hopkins*, *sup.* cited by Sugden, C., 1 D. & War. 455; In re *Eddel's Trust*, L. R., 11 Eq. 559; *Wade-Gery v. Handley*, 1 Ch. D. 653, 3 Id. 374.]

(t) Jac. 468; see also *Gibson v. Montfort*, 1 Ves. 490; *Glanville v. Glanville*, 2 Mer. 38; *Ackers v. Phipps*, 5 Sim. 44, 9 Bli. (N. S.) 431, 3 Cl. & Fin. 665; [*Lachlan v. Reynolds*, 9 Hare 796. But in acting upon this rule care must be taken to see that there is in fact a blending of the real and personal estate and not merely a

a gift of all the residue of the real and personal estate to the eldest of three persons who should attain twenty-one, charged with a sum of money to the others if they should attain that age, comprised the rents accruing between the testator's decease and the attainment by the devisee of the prescribed age. He said, "The general principles are these:—When personal estate is given to A at twenty-one, that will carry the intermediate interest. If a testator gives his estate, Black-acre, at a future period, that will not carry the intermediate rents and profits; but where he mixes up real and personal estate in one clause, the question must be whether he does not show an intention that the same rule must operate on both."

It should be observed that this question regarding intermediate income of residuary real estate is not affected by the act 1 Vict., c. 26, § 24. (u)

II.—It remains to be considered whether reversions will pass under a general devise of lands. In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will; (x) but they have been generally treated as belonging to the same class and sufficiently approximate in principle to warrant at least their juxtaposition.

Operation of a
general devise
on reversions.

Reversions in fee, then, will pass under a general devise of lands or hereditaments, (y)³ although the testator be seized of *real estates in

gift of one, by reference to *some* of the trusts declared of the other, *Hodgson v. Bective*, 1 H. & M. 397. Distinguish also between a postponed or contingent gift of the residue, and a particular interest to commence *in futuro* in a fund already constituted, which latter does not carry intermediate income even of personalty, *Talbot v. Jevers*, L. R., 20 Eq. 255; *Weath-erall v. Thornburgh*, 8 Ch. D. 261. See also *In re Drakeley's Estate*, 19 Beav. 395; *Marriott v. Turner*, 20 Id. 557; *In re Sanderson's Trust*, 3 K. & J. 510.

(u) *Hodgson v. Bective*, 1 H. & M. 396, (will dated 1853.)

(x) See *Tennent v. Tennent*, 1 Jo. & Lat. 388.]

(y) *Chester v. Chester*, 3 P. W. 56;

Pain v. Ridout, 3 Atk. 486; *Atkyns v. Atkyns*, Cowp. 808, 3 B. P. C. Toml. 408: see also *Doe d. Crump v. Sparkes*, 4 D. & Ry. 246.

3. See *Den v. Creveling*, 1 Dutch. 449; *Shreve v. Shreve*, 2 Stockt. 385; *Van Rensselaer v. Read*, 26 N. Y. 558; *Hunter v. Hunter*, 17 Barb. 28; *Van Kleek v. Ref. Dutch Church*, 6 Paige 600; *Allen v. Van Meter*, 1 Metc. (Ky.) 264; *Yeomans v. Stevens*, 2 Allen 349; *Steel v. Cook*, 1 Metc. 281; *Burke v. Chamberlain*, 22 Md. 298; *Cruger v. Hayward*, 2 Desaus. 422. So rents due on leases in fee, *Main v. Green*, 32 Barb. 448; but see, *contra*, *Herrington v. Budd*, 5 Denio 321; *Miller v. McNair*, 11 Iowa 525.

possession to satisfy the words of the devise (a fact, however, which, in regard to wills made since 1837, would be immaterial;) and although he may have been ignorant when he made his will of his having such a disposable interest; (z) or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail. (a)

It has been even held that a testator's reversion in fee in settled lands will pass under a devise of his "*lands not settled*," (b) or of his lands and hereditaments "*out of settlement*," (c) or "*in the towns of L., M. and N., or elsewhere, not by him formerly settled or thereby disposed of*." (d) The argument in these cases was, that, although certain estates in those lands were settled, yet that the reversion was not, and consequently it fell within the restrictive terms of the testator's description.

So, in *Glover v. Spendlove*, (e) where A on his marriage having settled certain lands on himself for life, remainder to B, his intended wife, for life, remainder to their first and other sons in tail male, remainders over, reversion to himself in fee, by his will devised to his daughters in fee "*all his lands not settled in jointure upon his wife*;" Lord Thurlow held, without hesitation, that the reversion passed by the will.

It is true that, in *Goodtitle d. Daniel v. Miles*, (f) where the same words occurred, Lord Ellenborough seemed to think they were descriptive of the *corpus* of the lands, and not of the devisor's interest. He distinguished the other cases on account of the variation of expression; and *Glover v. Spendlove*, on the ground that there the testator had no son, and therefore "*had, for all the purposes of substantial benefit, the fee expectant on his wife's life estate, she being then alive*;" but his lordship's reasoning on this point is evidently untenable, [and the opinion of the court was expressly rested upon grounds strong enough, in their judgment, to support it, even supposing the words in question

(z) Persons not professionally informed do not readily apprehend the alienable nature of reversionary contingent interests.

(a) *Dalby v. Champernon*, Skinn. 631, where, however, it was controlled by the context.

(b) *Cooke v. Gerrard*, 1 Lev. 212.

(c) *Strode v. Russell*, 2 Vern. 621, 1 Eq. Cas. Ab. 210, pl. 18, 3 Ch. Rep. 169, and (*nom.* *Falkland v. Lytton*), 3 B. P. C. Toml. 24.

(d) *Chester v. Chester*, 3 P. W. 56, 2 Eq. Cas. Ab. 330, pl. 9.

(e) 4 B. C. C. 337.

(f) 6 East 494, stated *post* p. *660.

to be insufficient of themselves to restrain the effect of the general words.]

If Lord Ellenborough's observations could be considered as *throwing a shade over the doctrine, it has been completely dissipated by *Att.-Gen. v. Vigor*, (g) where Lord Eldon expressed a decided opinion that the reversion in lands, settled on the marriage of the testator's son with Lady K., passed by a devise of all the testator's lands, *which he had not settled or assured, or agreed to settle or assure, to the use of his said son and the issue male of his body, upon his marriage with Lady K. his wife*; [and by *Incorporated Society v. Richards*, (h) where the testator—having upon his marriage agreed to settle certain estates in trust for himself for life, remainder to provide a jointure for his wife, remainder to his issue in tail, remainder to himself in fee—devised all his *unsettled* real estate to his wife for life, remainder over, and Sir E. Sugden, C., held that the reversion passed as part of the unsettled estates.]

Though the rule of construction established by the preceding cases has been much condemned, as savoring of extreme technicality and inimical to popular notions and probable intention; (i) they have, it is conceived, placed it beyond the reach of controversy. [They also show that the possession by the testator at the date of his will of lands, no estate or interest in which has been settled, and to which the devise is applicable, will not exclude the operation of the will.]

On a principle not very dissimilar, it has been held, that a devise of lands "not before devised," or "not before disposed of," carries the reversion in lands which the testator had previously devised for life. (k)

The inclination of the courts at the present day not to exclude a reversion from a general devise upon slight or equivocal grounds, is strongly illustrated by *Doe d. Howell v. Thomas*, (l) in which a reversion in fee in an estate limited to the testator's first and other sons in strict settlement was held to pass

"Lands not before devised."

Force of general devise not restrained by ambiguous expressions.

(g) 8 Ves. 256, 272.

[(h) 1 D. & War. 258; see also *Jones v. Skinner*, 5 L. J., (N. S.) Ch. 87; *Crowe v. Noble*, Sm. & Bat. 12.

(i) Sir J. Mansfield, in *Morgan v. Surman*, 1 Taunt. 292, characterized *Chester v. Chester* as "a shocking decision;" but he admitted it had been followed by numerous others; [and see the rule defend-

ed by Sir E. Sugden, 1 Dr. & War. 285; and by *Pepys*, M. R., 5 L. J., (N. S.) Ch. 87.]

(k) *Rooke v. Rooke*, 2 Vern. 461, 1 Eq. Cas. Ab. 210, pl. 17; *Willows v. Lydcot*, 2 Vent. 285, 3 Mod. 229; [*Taaffe v. Ferrall*, 10 Ir. Ch. Rep. 183;] but see *Hyley v. Hyley*, 3 Mod. 228.

(l) 1 Scott, N. R. 359, 1 M. & Gr. 335.

under a devise of estates over which the testator had a power of disposal, though in another part of the will he referred to the estate in question *as property over which he had no power*. [And in *Ridgeway v. Munkittrick*, (m) where a testator directed his trustees *to let a certain mill, and also dispose of his stock in trade and *other properties* to the best advantage, Sir E. Sugden held that the mill was included in the term "*other properties*."]]

But the great question which has been agitated, in regard to the operation of a general devise upon a reversion is, whether the inaptitude of *some* of the limitations be a ground for their exclusion.

Whether inapt limitations will exclude a reversion.

In reference to this question, it is proper to consider separately those cases in which there are other lands to which the limitations in question are applicable, and those in which the reversion is the only property of the testator that the devise could apply to.

Where there is other real estate;

—where not.

With regard to the first, it is quite clear that the impossibility of some of the limitations operating on the reversionary interest, will not have the effect of excluding it from the devise; as the limitations inapplicable to the reversion will be considered as referring exclusively to the other lands, and the other limitations as applicable to the whole *referendo singula singulis*.

Inaptitude of limitations no ground of exclusion in cases of former class.

Thus, in *Doe d. Earl Cholmondeley v. Weatherby*, (n) where a reversioner in fee, having also other lands, devised his real estate generally, charged with annuities to three persons for their lives, one of whom was tenant for life of the lands in which the devisor had the reversion, and as to whom, therefore, the charge in respect of those lands was void, it was held that the reversion passed; for though that annuity could not be charged upon this particular property, there was other real estate which might be charged with it. Referring, then, the charge of the three annuities to the several properties devised by the residuary clause, *singula singulis*, the charge would attach upon all the estates as to two of the annuities, and upon all but this reversion as to the three.

Doe v. Weatherby.

[So, in *William d. Hughes v. Thomas*, (o) where a testator having a reversion in fee expectant on an estate tail in another person, and having also other lands in possession, after several

William v. Thomas.

[(m) 1 D. & War. 84.]

v. Fossick, 1 B. & Ad. 186.

[(n) 11 East 322; S. P., *Doe d. Moreton*

[(o) 12 East 141.]

specific devises, gave all the residue of his estate and effects real and personal whatsoever and wheresoever, after payment of his debts, legacies and funeral expenses, to his wife absolutely; it was at first argued that the charge of debts legacies and funeral expenses showed that the testator could not have contemplated a distant reversion; but the argument was afterwards abandoned, and it was held to be quite clear that the reversion was included.]

To this principle may also be referred the case of *Freeman v. Duke of Chandos*, (p) where A, having the reversion in fee of estates in Gloucester and Worcester which were settled on his marriage, and of other estates in two other counties which were not included in that settlement, devised all his lands and hereditaments in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England; and all his estates or interest in reversion, remainder, or expectancy, *subject to certain charges and to certain limitations, to his brothers and their respective first and other sons, in and by his marriage settlement, bearing date, &c., expressed*, in trust, in case himself and his brothers should all die without issue male of their bodies, or his brother should die before twenty-one, for certain persons. It was contended that from these words it was manifest that the testator had no other than the settled estates in his contemplation; but it was held that the reversion in the other lands passed.

So, in *Doe d. Nethercote v. Bartle*, (q) where a man, having in the parish of A lands of which he was tenant in fee, and also lands which had been settled to the use of himself for life, remainder to his wife for life, with remainder to their issue in tail, *leaving the ultimate reversion in himself*, (both of which were in his own occupation,) devised unto his wife all his freehold and copyhold lands of which he was then in the immediate possession, lying in the several parishes of A and B, and also all his reversionary estate expectant on the death of his mother in other lands in A and B, to his said wife for life; remainder to his daughter in fee. It was held that the reversion in the settled lands passed, although the wife was tenant for life,

Doe v. Bartle.

(p) Cowp. 363. The report of this case is very defective: it neither states the uses to which the property in question was subject, nor the nature of those limited by the will; see also *Strong v. Teatt*, post p. *658, which read in this place for the reason assigned, n. (x).

(q) 5 B. & Ald. 492; [and see *Ford v.*

Ford, 6 Hare 486; *Honywood v. Honynwood*, 2 Y. & C. C. C. 471. The latter case appears contrary to the authorities, but the ground of the decision (which is not stated) may have been that the devise of the reversion was revoked by subsequent conveyance.]

and the daughter tenant in tail in remainder of those lands, under the settlement.

These decisions have established, that the inapplicability of some of the limitations will not exclude a reversion, if there be other lands upon which those limitations can operate. And the same rule of construction has been applied even to deeds. (r)

In *Mostyn v. Champneys*, (s) an attempt was made to exclude a reversion in fee expectant on an estate tail from a devise of all the testator's real estate whatsoever and wheresoever *over which *he had any disposing power* to trustees for a term for raising debts, funeral charges and legacies, on the ground that the testator himself was tenant in tail of the lands in question; and that he could not intend to describe such a remote reversion as property over which he had a disposing power, he having taken no steps to enlarge his estate tail, as he might have done, into a fee simple. The testator had other real estate in possession, to which it was admitted the devise in question extended. The Court of C. P. certified that, the words of the devise being sufficient to include the reversion, and no intention to exclude it being expressed, or necessarily implied from other parts of the will, such reversion passed.

But the other class of cases, namely, where the reversion is the only real estate of the testator upon which the general devise can operate, (the will being of course made before 1838,) is susceptible of a different train of reasoning, and is certainly environed with more difficulty, both upon principle and the authorities. There being no other lands to which the inapplicable limitations can be referred, the argument for the exclusion afforded by their introduction is obviously stronger; but, on the other hand, is met by the argument that the testator must have intended the devise to operate upon *some* property; for, as he could, under the old testamentary law, only dispose of the lands of which he was seized at the time of making his will, he was always to be supposed to have a specific subject in his contemplation when he made a devise, however general in its terms. (t) The question, then, was, whether a testator was rather to be presumed to subject to certain limitations, property, which *some* of those limitations could never reach, or to make a devise which must necessarily be *altogether* inoperative. It will be seen that

(r) *Doe v. Jeyes*, 1 B. & Ad. 593.

(s) 1 Scott 293, 1 Bing. N. C. 341.

(t) See *Hockley v. Mawbey*, 1 Ves., Jr., 152.

the early decisions incline against, and the latter in favor of, the application of the devise to the reversion in such cases.

Thus, in *Strong v. Teatt*, (*u*) where C., having on the marriage of his son H. settled the manor of A., in the county of T., on himself for life, remainder to H. for life, remainder to the first and other sons of the marriage in tail, with reversion to himself in fee; and having issue three other sons, A., J., and T.; by his will, devised certain lands of which he was seized in fee in possession, and all other his lands, tenements and hereditaments in the counties of T. and M., (*x*) to the use of his son A. for life; *remainder to his first and other sons in tail male; and so on to the sons J., T., and H., and their sons in succession; and provided that if it should happen that his sons H. and A. should both die without issue male in the lifetime of his son J. *whereby the estate settled upon H. upon his marriage would descend upon J.*, then that his said son J. should not take any estate or interest in the lands thereinbefore devised to him; but that the same should go to T. The question was, whether the reversion in the settled lands passed. Lord Mansfield was of opinion that the latter clause was conclusive that the testator did not mean the reversion to pass; for, if it had, it could never “*descend*” upon J., which was the event provided for.

There were certainly strong grounds in this case for the restricted construction.

In *Roe d. James v. Avis*, (*y*) a reversion in fee expectant on an estate tail [in another person] was held not to pass under a devise of all the residue of the testatrix’s real estate and effects *to be sold as soon as might be after her death and her funeral expenses to be paid thereout*, and the overplus (if any) to be divided between A and B, on the ground that the purpose to which the proceeds of the sale were to be applied, namely, the payment of funeral expenses, showed that the testatrix meant to dispose of something which might be sold immediately.

Roe v. Avis.

Remote reversion excluded from trust for immediate sale.

This reasoning is evidently unsatisfactory. A reversion expectant on an estate tail is not absolutely unsalable, though it may be of little value; and, if capable of being sold at all, why may it not be disposed of to pay funeral expenses as well as for any other purpose?

(*u*) 2 Burr. 912, affirmed in D. P., 3 B. P. C. Toml. 219.

that before described, and which, therefore, would satisfy the word “other.”

(*x*) He had another estate in T., besides

(*y*) 4 T. R. 605.

Lord Eldon (z) has spoken of this case with disapprobation, and as the unsuccessful argument for the exclusion of the reversion in *Mostyn v. Champneys*, (a) stated under the former division, was principally based on its authority, that case must be considered to have completely overturned it, if indeed the task had not been performed by antecedent adjudications. (b)

Another instance of the restrictive construction occurs in *Goodtitle v. Miles*. d. *Daniel v. Miles*, (c) where, on the marriage of A with B, lands had been settled [by A's father] to the use of A for life; remainder to B for life for her jointure; remainder *to the heirs of the body of B by A to be begotten; remainder to the right heirs of A. A survived his wife, having had by her two daughters, C and D, who survived him, and were his heirs-at-law. By his will, A devised to his daughter C, *and to the heirs of her body lawfully begotten*, certain freehold lands of which he was seized in fee in possession, and all other his freehold, copyhold and leasehold lands, which he should be possessed of, or entitled to, at the time of his decease, *and which were not settled in jointure on his late wife*; the said daughter and the heirs of her body paying thereout to his daughter D £15 yearly during her life. And in case his daughter C should happen to die, and leave no issue of her body, he devised the lands to his daughter D, for life, and, after her decease, to her children then living; and, for want of such issue, then over. The deviser had no real estate other than lands expressly devised, besides the reversion in question. The question was, whether the reversion passed. The Court of K. B. held that it did not: they admitted that the general words, if unrestrained, would carry the reversion, but as the daughters had estates tail in the settled lands, so that the testator had no disposable interest, unless they both died without issue, if these lands were included the devise to C in tail was necessarily inoperative; (d) since she had an estate of the same duration under the settlement: she would then be tenant in tail general under the will, expectant on the determination of an estate tail general already subsisting in herself under the settlement. The same observation applied to the devise to his daughter D for life, remainder to her children, which could not possibly take effect. Upon this ground,

(z) 15 Ves. 403.

(a) 1 Scott 293, 1 Bing. N. C. 341, *ante* post p. *662, n. (k).]

p. *657.

[(b) See acc. per Parke, B., 6 Ex. 47;

(c) 6 East 493.

(d) 6 East 493.

[(d) See *Badger v. Lloyd*, 1 Salk. 232.]

and adverting also to the restriction of the devise to lands "not settled in jointure on his wife," (e) the court held that the reversion did not pass.

So far the cases certainly favor the restrictive construction; but *Church v. Mundy*, (f) gives a new complexion to the doctrine on this subject. M. having a reversion in fee expectant on an estate tail in his brother C., devised all

Church v. Mundy, as decided by Sir W. Grant.

his real and personal estate to his wife for life; and if she should die leaving no issue, then in trust for C., his heirs, &c.; and in case C. should not be then living, to be at the disposal of the testator's wife. The testator had no other real estate. Sir W. Grant, M. R., held, that the *reversion did not pass, conceiving that the testator could not intend to comprehend in that devise any estate but such as his wife might take for life, and C. might enjoy afterwards, which was impossible as to this reversion; for, until the death of C., without issue, it could not fall in. But Lord Eldon reversed this decree; (g)—"The question is (he said) whether, as the pur-

Decree at the Rolls reversed by Lord Eldon.

poses of this will are such, to which this subject cannot be so conveniently applied as a present interest in possession, not in remainder, the testator is to be considered as meaning nothing by this clause. In every case of this sort, the testator had some property, which was the foundation of an argument, that property which could be conveniently applied should pass, and that which could not be conveniently applied should not pass. That conclusion is very much confirmed by this will; adverting to the different situations in which the testator's family may be at his decease, particularly that the tenant in tail might not be living. If the testator had been asked whether he meant to dispose of his reversion, if his brother should be living, his answer would have been, that he intended to dispose of all he could dispose of; to take the chance for his wife and children; the instrument itself supposing that his brother may die before him: and disposing in terms that can apply to nothing besides this property. If the event of his brother's death within a week, without barring the entail, had been put to him, he would have answered, that, in that event, he intended to pass the property; and

Reversion included notwithstanding inapplicable limitations.

(e) As to which, see *ante* p. *654.

(f) 12 Ves. 426; see also *Att.-Gen. v. Vigor*, 8 Ves. 256, where the point seemed too clear to admit of a question, the devise being simply to two persons in fee, of

lands, in which they had successively chattel interests determinable with their respective lives.

(g) 15 Ves. 396.

he would not have thought it necessary to republish his will ; which, if the words are sufficient to carry this property, would not be necessary." * * * "I am strongly influenced towards the opinion, that a court of justice is not by conjecture to take out of the effect of general words, property, which those words are always considered as

Lord Eldon's
statement of
the general
rule.

comprehending. *The best rule of construction is that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary ; and surely that is the safest course, when, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning."*

It is evident, therefore, that he considered the improbability that the testator should intend to include a reversion in a devise, having limitations, some of which could never operate upon that reversion, as less violent than that he should make a devise without having any real estate upon which all the limitations could *operate: and even if it be said that these general devises are frequently made by testators, without having in view any specific property, as the fact undoubtedly is, yet this does not add much to the force of the argument for the exclusion ; for it shows that the testator used the general clause for the purpose of including any property which he might inadvertently leave undisposed of ; and if he were told that he had such a reversion, but which could not be affected by some of the limitations of the devise, his answer would be, then let it be operated upon by the others.

It should be observed, that *Church v. Mundy* has been referred to by Sir W. Grant, (whose decree was reversed in that case,) (h) as depending on its particular circumstances ; namely, that if the brother had died before the testator, an event which his will expressly contemplated, the devise would at the moment of the testator's death have had its complete operation in favor of the wife ; and was considered by him as not necessarily deciding, that where A, tenant for life, with remainder to B in tail, with reversion to himself in fee, devised to B (the tenant in tail) for life, with remainder to C, his eldest son, for life, with remainder to the first and other sons of C in tail, the reversion would pass. The point, however, was only indirectly brought into discussion before the M. R., in the consideration of the question, whether such a reversioner making a devise in

Sir W. Grant's
view of *Church
v. Mundy*.

[(h) See Sir W. Grant's judgment in *Welby v. Welby*, 2 Ves. & B. 187.

these terms, was to be considered as intending to pass his own reversion only, or the *corpus* of the land, inclusive of B's interests, so as to raise a case of election against B: the latter was decided. (*i*) Since this period, in every instance in which the question whether a reversion passes by a general devise has been agitated, it has been decided in the affirmative; (*k*) and, though in all these cases, there happened to be other real estate to which the limitations inapplicable to the reversion might be referred, yet little or no stress seems to have been laid on that circumstance; and they were decided on the broad ground, that the words of the devise being sufficient to comprise the property, it would pass, without going into the question, whether the testator, could be supposed to *have had it actually in his contemplation when he framed the devise, or not.

The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the testator or another,) and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question; and, that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not. Indeed, the latter fact would, of course, be wholly immaterial in the case of a will made or republished since 1837, any general devise in which would comprise after-acquired real estate; precluding, therefore, all inquiry into the *then* state of the testator's property, as affording any insight into the intention.

[But if the testator is possessed of a reversion to which none of the limitations are applicable, the question, it is conceived, is by no means the same. Sir W. Grant, indeed, thought there would be no room for arguing such a case; for that would be to say, the reversion passed, although it were so given that nobody could take it. (*l*) There seems to be no decision on the point.]

General conclusion from the cases.

Where none of the limitations are applicable.

Opinion of Sir W. Grant.

(*i*) See also per Sir G. Turner, *Wintour v. Clifton*, 3 Jur. (N.S.) 77, 26 L. J., Ch. 223.]

(*k*) *Vide* cases, *ante* pp. *655, *656; [and 6 Hare 494, where Wigram, V. C., cites and approves of the observations in the text; *Alliston v. Chapple*, 6 Jur. (N.

S.) 288; *Taaffe v. Ferrall*, 10 Ir. Ch. Rep. 183. In *Tennent v. Tennent*, 1 Jo. & Lat. 388, Sir E. Sugden treated *Roe v. Avis* and *Goodtitle v. Miles* as clearly overruled by the current of later authorities.

[(*l*) *Welby v. Welby*, 2 Ves. & B. 197. The point was touched upon in argument

III.—When it was necessary to the operation of a devise of copyholds that they should have been surrendered to the use of the will, (m) the rule was, that copyholds [so surrendered would pass under a devise of lands, tenements or hereditaments, or other general words descriptive of real estate; (n) but] that copyholds not so surrendered would not pass under such a devise, (o) *unless the testator had no freehold lands upon which it might operate; in which last case, [as there was a clear intention to pass something, the devise was held in equity to operate on the copyholds; (p) in favor, however, of those objects only for whom a surrender was supplied of unsundered copyholds expressly mentioned in the will, that is to say,] the testator's creditors, (q) and also his wife and children, (r) but not in favor of grandchildren, (s) unless the testator had placed himself *in loco parentis*, (t) or natural children; (u)

in *Tennent v. Tennent*, Dru. 161, 1 Jo. & Lat. 379, where, first, the T. estate was entailed on R. J., and then the residue was devised to R., with a direction at his death to entail the subject of disposition on R. J. in the same manner as the T. estate was entailed on him. It was argued that as the prescribed entail would be wholly inoperative upon the reversion in the T. estate, this reversion was not subject to the *direction*; and if not, so neither were certain other estates, which were included with it in the *devise* to R., and which he thus took in fee. But Sugden, C., rejected this argument: he treated the gift to R. and the direction to entail as parts of one devise or series of limitations, so that the case became one where some, not all, of the limitations were inapplicable to the reversion. "It is now settled," he said, "that a reversion in fee will pass under a general devise unless a clear intention to exclude it is shown, though it is limited *in part* to the same uses to which the particular estate is already dedicated." There was thus no decision on the point in question.]

(m) See *ante* p. *56.

(n) 2 Atk. 85; 1 Ves. 226, 273; 6 Mad. 363, 364; and 2 Powell on Devises by Jarman, p. 123, u.

(o) Amb. 274; 2 Ves. 164; 1 Atk. 387;

3 B. C. C. 188; 2 B. C. C. 64; 15 Ves. 400; also 1 Cox 247; 13 Ves. 168; 15 Id. 390; 9 Pri. 556. And under a devise of lands *at A.*, copyholds situate there would not pass, if the testator had freeholds at that place, 1 Eq. Cas. Ab. 124, pl. 14.

(p) 1 Ves. 215; 1 Atk. 385; 2 Ves. 582; 12 Ves. 426; 15 Id. 396; 1 Ves. & B. 406.

(q) See *infra*. ["The execution of a power and the surrender of a copyhold go hand in hand, precisely on the same ground." Per Sir R. P. Arden, *Chapman v. Gibson*, 3 B. C. C. 231; see Sugd. Pow. 530, (8th ed.); *Freeman v. Freeman*, Kay 479, 5 D., M. & G. 704.]

(r) *Hardham v. Roberts*, 1 Vern. 132; *Hills v. Downton*, 5 Ves. 557; [if the interest of the favored individuals was limited, the surrender was supplied *pro tanto* only, and all besides resulted to the customary heir, *Marston v. Gowan*, 3 B. C. C. 170.]

(s) *Kettle v. Townsend*, 1 Salk. 187, 1 Eq. Cas. Ab. 123, pl. 8; but see *Hills v. Downton*, 5 Ves. 565, and see 1 P. W. 60.

(t) See *Perry v. Whitehead*, 6 Ves. 544. And generally as to a testator placing himself *in loco parentis*, see Powys v. Mansfield, 3 My. & C. 359.

(u) *Fursaker v. Robinson*, Pre. Ch. 475, 1 Eq. Cas. Ab. 123, pl. 9.

nor, it seems, even for the wife and children, if the will contained a provision for them. (x)

The rule that copyholds would not pass if there were freeholds was held to apply to a case where the will, being attested by two witnesses only, was, under the then existing law, inadequate to pass the freeholds; (y) the case being, it was considered, not analogous to those in which there were no freeholds, as the failure of the devise arose, not from the absence of intention, but from the positive rule prescribed by the statute of frauds.

Unattested will.

Questions of this nature, however, can no longer arise, since the statutes dispensing with the necessity of a surrender to the use of the will, (z) which have placed freeholds and copyholds *pari passu* in regard to the operation of a general devise,—a point which in a former publication of the writer was strenuously contended for, and is now settled by authority. Thus, in *Doe d. Clarke v. Ludlam*, (a) where a testator, having both freehold and copyhold estates at C, devised the whole of his real and *personal estates and effects whatsoever and wheresoever, which he might be possessed of at the time of his decease, to A, his heirs and assigns, forever; it was held that the copyholds, as well as the freeholds, passed by the devise. [And in *Reeves v. Baker*, (b) a devise of “all the rest, residue and remainder of my property,” though followed by the words “whether freehold or personal, and wheresoever situate,” was held to include copyholds, the latter words being considered to be merely an imperfect enumeration of particulars.]

Effect on construction of statutes dispensing with surrender to the use of will.

Unsurrendered copyholds now pass by general devise.

And the circumstance that some of the limitations and clauses in the will were inapplicable to copyholds, (for instance, estates for life, limited without impeachment of waste,) would not prevent their passing by such a general devise, (c) the testator having other property to which the inapplicable clauses might be referred.

(x) *Ross v. Ross*, 1 Eq. Cas. Ab. 124, pl. 14; *Lendopp v. Eborall*, 3 B. C. C. 188; but see *Tudor v. Anson*, 2 Ves. 582; [*Wentworth v. Cox*, 6 Mad. 363.]

also *Edwards v. Barnes*, 2 Scott 411; [2 Bing. N. C. 252; *Doe d. Edmunds v. Llewellyn*, 2 C., M. & R. 503; *Usticke v. Peters*, 4 K. & J. 437.

(y) *Sampson v. Sampson*, 2 Ves. & B. 337; see also *Chapman v. Hart*, 1 Ves. 270, and 15 Ves. 407.

[(b) 18 Beav. 372.

(z) 55 Geo. III., c. 192; 1 Vict., c. 26, §§ 3 and 4.

(c) *Car v. Ellison*, 3 Atk. 73;] *Weigall v. Brome*, 6 Sim. 99: see also *Borrell v. Haigh*, 2 Jur. 229; *Jackson v. Noble*, 2 Kee. 590.

(a) 7 Bing. 275, 5 Moo. & P. 48; see

[If the testator had only the equitable estate in copyholds, it did not, at least before the statute 55 Geo. III., pass by a general devise of lands; for it could not be surrendered, and there was no other clear indication of an intention to pass copyholds. (d) But it has been said, (e) that possibly, since the statute, an equitable interest in copyholds would pass under such a general devise, for equity would follow the law; and as, since the statute, general words included legal copyholds, (f) the same rule might apply in cases of trusts of copyholds.]

Lord Eldon, in *White v. Vitty*, (g) suggested whether, as the act of 55 Geo. III., c. 192, makes a surrender unnecessary for a devise of copyholds, a surrender to the use of the will could now be considered as any evidence of intention that copyholds should pass by a general devise; and, certainly, if unsurrendered copyholds had been held not to pass in *Doe v. Ludlam*, it might have been a question whether the same principle did not apply to surrendered copyholds; but, fortunately, the sound decision of the Court of C. P. in that case precludes any such question. However, it was deemed expedient to provide expressly by 1 Vict., c. 26, § 26, that copyhold estates shall pass, together with freeholds, under a general devise.

*The rule of construction established by *Doe v. Ludlam* has been held not to apply to a will the execution of which was *prior* to the statute 55 Geo. III., c. 192, though the testator was living when it was passed, and consequently a surrender to the use of the will was dispensed with; as the *subsequent* alteration of the law could not throw any light on the testator's intention when he made his will, and therefore ought not to exert any influence on its construction. (h)

Before the statute dispensing with surrenders to the use of the will, an exception to the rule that unsurrendered copyholds would not pass with freeholds under a general devise, occurred where the devise was for payment of debts, and the freeholds alone were inadequate to the payment of them; (i) the inference being, that the testator, who must be presumed to have

Exception where devise was for payment of debts.

[(d) *Torre v. Brown*, 5 H. L. Cas. 555, kind or nature."]

24 L. J., Ch. 757.

(g) 2 Russ. 488.

(e) By Lord Cranworth, *Ib.*

(h) *Doe d. Smith v. Bird*, 5 B. & Ad.

(f) Referring to *Doe v. Ludlam*. See 695.

also *Seaman v. Woods*, 24 Beav. 372, where this point seems to have been assumed in favor of the devisee. The devise was of "all the estate of whatever

(i) 1 P. W. 443; 3 Id. 322; Cas. t. Talb. 78; 1 B. C. C. 273; 3 Id. 257; 2 Cox 397; 12 Ves. 136; 13 Ves. 168; 15 Id. 393.

intended to provide a sufficient fund, meant the copyholds (which then were not assets for the payment of debts) to be included. (*k*)

Now, however, these cases of lands charged with debts no longer exist as a distinct class; but with regard to them, also, the statute has introduced an alteration as to the order of the application of freeholds and copyholds so charged. Thus, suppose the testator charge his lands generally with the payment of his debts, and then devise a freehold estate to A and a copyhold estate to B; A's freehold would, according to the construction established before the statute, have been applied in the first instance, and then B's copyhold; (*l*) but now it is clear they would be applicable *pari passu*, and in proportion to their respective value, as was the rule before the statute, where the copyholds were surrendered. (*m*)

Effect of the new doctrine upon these cases, suggested.

Under a general devise of *copyhold* lands unsurrendered copyholds were held to pass even before the statute of 55 Geo. III.; (*n*) although the testator had other copyholds which were surrendered. (*o*) In order to restrain the devise to the surrendered copyholds in such a case, it was necessary to show restrictive words; (*p*) which brings us to a question much discussed, namely, whether a reference to the fact of the testator having surrendered the copyholds, restricts the devise to copyholds so surrendered.

General devise of copyholds.

*In *Banks v. Denshaw*, (*q*) Lord Hardwicke thought that a devise of freehold and copyhold lands ("having surrendered the copyhold part thereof to the use of my will,") did not restrict the devise to surrendered copyholds. On the other hand, in *Gascoigne v. Barker*, (*r*) he held that a devise of all the testator's lands, freehold and copyhold, in the parish of Chiswick, and elsewhere, in the county of Middlesex ("which I have surrendered to the use of my will,") was restricted by the parenthetical clause to the copyholds surrendered. In *Wilson v. Mount*, (*s*) Sir R. P. Arden, M. R., on the authority of the last case, held that a devise of all the testator's freehold and copyhold lands ("the copyhold whereof I have surrendered to the use of my will,") was confined to surrendered copyholds.

Restrictive effect of reference to copyholds as surrendered.

(*k*) See 15 Ves. 394.

(*l*) *Coombes v. Gibson*, 1 B. C. C. 273.

(*m*) *Growcock v. Smith*, 2 Cox 397.

(*n*) *Byas v. Byas*, 2 Ves. 164; *Frank v. Standish*, 1 B. C. C. 588, n., 15 Ves. 391, n.

(*o*) *Blunt v. Clitherow*, 10 Ves. 589.

(*p*) *Wilson v. Mount*, 3 Ves. 191.

(*q*) 3 Atk. 585, 1 Ves. 63.

(*r*) 3 Atk. 8; see also *King's Head Inn Case*, cited 1 Ves. 63, 121.

(*s*) 3 Ves. 191.

But, in a more recent case, (t) Sir J. Leach, V. C., held that the words ("and which I have surrendered to the use of this my will,") following a devise of copyhold lands, did not restrict it to surrendered copyholds. He said the expression was affirmative and not exceptive, and that the copulative "and" distinguished the case from *Wilson v. Mount*. (u) [And in another case (x) he came to the same conclusion upon the words, "the copyhold part thereof having been duly surrendered to the uses of this my will." Even this case he thought different from that before Sir R. P. Arden, who, he said, considered himself as yielding to authority in making a decision "which had not given universal satisfaction."]

So refined are the distinctions which these cases present. It seems to be clear, however, that, if *all* the testator's copyholds be unsurrendered, no expressions of this kind will restrict the devise, as the effect would then necessarily be to render it wholly inoperative. (y)

IV.—The next inquiry is, whether property, in which the testator

is possessed of a term of years only, will pass by a *general devise. The rule on this subject, of which the early case of *Rose v. Bartlett* (z) is the well-known leading authority, is, that "where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee simple lands pass only, and not the leases for years; but if he hath no fee simple, the lease for years passeth, for otherwise the will should be merely void." 4

Both these propositions are law at the present day, in reference to wills made before the year 1838. The former indeed was long *vexata*

Leaseholds for years, when they pass under general devise.

(t) *Strutt v. Finch*, 2 S. & St. 229; but see also *Pullin v. Pullin*, 10 J. B. Moo. 464, 3 Bing. 47, and other cases cited *post* ch. XXIV.

[(u) The M. R. said (3 Ves. 193,) that the words in *Gascoigne v. Barker* were "and which," &c., according to the R. L. Therefore, even this slender distinction disappears.

(x) *Oxenforth v. Cawkwell*, 2 S. & St. 558. It is remarkable that the customary heir did not contend that the alleged devisees, being the testator's nephews, were not within the equity extended to creditors, wives and children; or, at least, that the nephews were not put to prove that

the testator had placed himself *in loco parentis*.]

(y) *Rumbold v. Rumbold*, 3 Ves. 65; *Wilson v. Mount*, Id. 194; [*Hills v. Downton*, 5 Ves. 557.]

(z) Cro. Car. 293; [the rule was also applicable to a *grant* of land by deed, but, it would seem, with some variations arising out of the different natures of the instruments, *Shep. Touch.* 88, 91, 92; *Doe v. Williams*, 1 H. Bl. 25; *Francis v. Minton*, L. R., 2 C. P. 543.]

4. So *Minnis v. Aylett*, 1 Wash. (Va.) 300; but see, *contra*, *Shreve v. Shreve*, 2 C. E. Gr. (N. J.) 487, reversing 2 Stockt. 385.

questio; and the reluctance to assent to it arose from the conviction, that it subverted the intention of testators, who, it is obvious, employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate.

One of the earliest authorities is *Davis v. Gibbs*, (a) where a testatrix devised all her *lands, tenements, hereditaments* and real estate, in Kent, Essex, Bucks, Bedfordshire, and elsewhere in England, which she was any ways seized of *or entitled to*, to A and B for their lives equally; and after their decease she devised her said real estate to *the right heirs* of the said A and B, to *them and their heirs*, as tenants in common. The testatrix bequeathed all the residue of her personal estate, and all her mortgages, bonds, specialties and credits, to A and B. The testatrix had fee-simple lands in Kent, a mortgage of a term in Essex, and a statute in Bucks. It was therefore held that the mortgage term and statute did not pass.

Held not to pass with freeholds under a devise of lands, tenements and hereditaments.

Taking the circumstance of the enumeration of the counties into consideration, *Davis v. Gibbs* is certainly a strong decision in favor of the rule; though this would have had greater weight if the testatrix had had freehold lands in all the specified counties except those in which the chattel interests were situated, which does not appear to have been the case. It is not stated that she had either freehold or chattel property in Bedfordshire.

Observation on *Davis v. Gibbs*.

The rule [was established beyond dispute by numerous decisions, (b) and] was not negatived by the circumstance that the *will was inoperative as to the freehold estate, from defect of execution. (c)

Rule not varied though will not executed to pass freeholds.

So, in *Watkins v. Lea*, (d) Lord Eldon held that a renewable copyhold estate for lives, distributable as personal estate by the custom of the manor, and held in trust to be surrendered as the testator, his executors, administrators and

Copyhold estate distributable by custom as personality.

(a) 3 P. W. 26, 2 Eq. Cas. Ab. 326, pl. 34, Fitzgibb. 116.

(b) *Knotsford v. Gardiner*, 2 Atk. 450, where the devise was of "estates;" *Pistol v. Riccardson*, (limitation in tail,) 1 H. Bl. 26, n., more fully 2 P. W. 459, n. by Cox to *Addis v. Clement*; *Thompson v. Lawley*, 2 B. & P. 303, where Lord Eldon reviewed the authorities and fully recognized the rule. See also *Whitaker v.*

Ambler, 1 Ed. 151, where, however, the expression was "real estates," which, it should seem, would, independently of the rule in question, exclude leaseholds for years; see also 6 Sim. 99; [and *Parker v. Marchant*, 5 M. & Gr. 498, 2 Y. & C. C. 279.]

(c) *Chapman v. Hart*, 1 Ves. 271; see also *Sampson v. Sampson*, 2 Ves. & B. 337.

(d) 6 Ves. 633.

assigns, should direct, did not pass under a devise of freehold and copyhold estates, the testator having both freeholds and copyholds of inheritance. The limitations were inapplicable, being in strict settlement, so that the first tenant in tail would have taken the absolute property, though an infant; and there was no fund for renewal.

In all the cases hitherto cited except *Chapman v. Hart*, which is very briefly stated, the words of limitation were applicable exclusively to real estate; a circumstance which the judges always seemed glad to throw into their arguments in support of their decision. Considering, however, that these cases were all decided upon the authority of the general rule in *Rose v. Bartlett*, and that that rule recognizes no such limitation of the principle, it seems impossible to restrict it to such cases. This observation, however, only applies where there is an *absence* of words of limitation; for if words of limitation adapted to a chattel interest are used, they might possibly be considered as demonstrating an intention to include the leaseholds; though certainly no decision has gone this length, without some aid from the context.

The rule will of course yield to an indication of the testator's intention; and, therefore, if the will contained evidence that he meant the leaseholds to pass with freeholds under a general devise, it will be so construed. The struggle, however, has been to determine what amounts to such evidence of intent.

In *Hartley v. Hurle*, (e) a testator devised all his messuages, lands, tenements and hereditaments, to trustees, their heirs, *executors, administrators and assigns, according to their several and respective estates and interests therein*; and in another part of the will the trust for the application of the rents was declared to be "*subject to ground-rents and other outgoings*;" Sir R. P. Arden, M. R., thought the intention to include the leaseholds was sufficiently demonstrated: the word "ground-rents," he said, placed it beyond doubt. [And in *Swift v. Swift* (f) leaseholds were *held to pass by a devise of "real estate at F. forever, or otherwise according to the several and respective natures and tenures thereof."]

In *Doe d. Belasyse v. Lucan*, (g) Lord Ellenborough and Le Blanc,

(e) 5 Ves. 540.

(g) 9 East 448.

[(f) 1 D., F. & J. 160.]

[*670]

J., considered the imposition of a charge to which the freehold lands alone were inadequate, to be a ground for extending a general devise to copyholds. The principle, if admissible, would be equally applicable to the cases under consideration; but such inadequacy can only influence the construction, if it exist at the time of the making of the will.

Effect of a charge exceeding the value of freehold.

The fact of the freehold and leasehold lands having been blended and let together for a long period, and that of the latter being renewable, have sometimes been relied upon, as favoring the extension of the devise to leaseholds. Under such circumstances, an entire farm composed partly of freehold and partly of leasehold lands, was held in *Lane v. Stanhope*, (*h*) to pass by a devise of all the testator's "manors, messuages or tenements, houses, farms, lands, woodlands, hereditaments and real estate," unto A for life, and then to his first and other sons in strict settlement; and so to other persons, with remainder to B and his heirs and assigns forever. The testator bequeathed the residue of his money and personal estate to A. The respective lands had been always treated as forming one entire farm, and had been let together at one integral rent, which was reserved to the testator and his heirs. The court adverted to the inconvenience of splitting the farm, on account of the apportionment of the rent and the power of distress; and observed, that the first words of the residuary bequest applied to money, and it therefore could not be supposed that the testator intended to recur to land, he having already used words sufficient to comprise every species of landed property; (*i*) that the word used was "farms," which, in its general signification, means that which is held by a tenant; (*k*) and that the lease being renewable, the testator might have considered himself to have a sort of inheritance in it.

Farm composed of freehold and leasehold, held to pass under the word "farms."

The limitations were inapplicable to leaseholds; but Lord *Kenyon thought that circumstance not entitled to much weight. The occurrence

(*h*) 6 T. R. 345. See also *Doe d. Belasyse v. Lucan*, 9 East 448, (where the Court of K. B. inclined to think that copyholds would pass under the word *farms*, with freeholds); [*Hobson v. Blackburn*, 1 My. & K. 571, (where the limitations were applicable to freeholds only, but the leasehold part was accessible only through the freehold); *Goodman v. Edwards*, 2 My. & K. 759; *Swift v. Swift*, 1

D., F. & J. 160.] In *Arkell v. Fletcher*, 10 Sim. 299, upon the whole will, leaseholds were held *not* to pass by the word "farms."

(*i*) This argument assumes the question.

(*k*) Lord Kenyon, however, relied much less on the word *farm* than Grose and Lawrence, JJ.

of the word "farms" was considered to distinguish the case from *Pistol v. Riccardson*. Lord Eldon, in *Thompson v. Lawley*, referred to these several points in the case, and especially the last, which he seems to have regarded as the soundest ground of the decision.

The rule in question has been considered as excluded [by a devise of "land" containing a specified quantity where the quantity could not be made up without the leaseholds; (*l*) by] a devise of all the messuages, lands and tenements, in the parish of D., "which I am now *possessed of or any ways interested in*;" (*m*) and by a devise of "all my manors, messuages, lands, tenements, *mines of coal*, lead and other mines, rectories, advowsons, tithes, *rents* and hereditaments whatsoever, situate in the county of Cumberland," though the testator had freeholds in that county, [chiefly because the words were not "lands and tenements" merely, but "rents and mines of coal;" and the leaseholds had mostly been demised as *coal mines and levels at rents*. (*n*) And Eyre, B., refused to apply the rule to a devise of tithes. (*o*) But the last three cases were disapproved of by Lord Eldon. (*p*)

Of course, the fact of the testator having in his lifetime parted with the freeholds which he had when he made his will, so that *in event* the devise had nothing but leaseholds to operate upon, cannot vary the application of the rule; inasmuch as the intention of the testator at the period of *making the will*, is the point to be ascertained, and which cannot be elucidated by subsequent events. Nor is there any distinction between leaseholds acquired before and after the making of the will, in reference to the rule under consideration.

Leases *for lives*, being freehold interests, clearly will pass under a general devise, with freeholds of inheritance, unless an intention to exclude them can be collected from the con-

Leaseholds for lives not within the rule in *Rose v. Bartlett*.

[(*l*) *Goodman v. Edwards*, 2 My. & K. 759.]

(*m*) *Addis v. Clement*, 2 P. W. 456. See also *Dixon v. Dawson*, 2 S. & St. 327, [which, however, turned chiefly on the special wording of a direction how to keep the accounts; and see, *contra*, *Davenport v. Coltman*, 12 Sim. 588. The words "interested in or entitled to" were

held insufficient, *Pistol v. Riccardson*, 2 P. W. 459, n.]

(*n*) *Lowther v. Cavendish*, Amb. 356, better 1 Ed. 99. [But Lord Northington said he would have decided differently if there had been a bequest of personal estate, 1 Ed. 152.]

(*o*) *Turner v. Husler*, 1 B. C. C. 78.

(*p*) In *Thompson v. Lawley*, 2 B. & P. 315.

text. In one case (*q*) it was contended, that they did not pass with freeholds of inheritance, under a general devise of lands *to uses in strict settle*ment*, on account of the inapplicability of the limitations, it being impossible to entail them; but the will contained other grounds of exclusion. And in subsequent cases it was decided, that freeholds for lives *did* pass by a general devise, though in one (*q*) the devise contained limitations in tail, and the testator was also seized of freeholds of inheritance; and in another, (*r*) although some of the limitations were inapplicable, being remainders expectant on life estates, which were given to persons who were the *cestuis que vie* in the leases.

Whether leaseholds for years pass with *copyholds* of inheritance, under a general devise, seems doubtful. In *Roe d. Pye v. Bird*, (*s*) the question was whether a mortgage term passed with copyholds, under a devise of all that his (testator's) estate in B. to M. and her heirs; and it was held that it did pass, principally on the ground that the leasehold and copyhold lands had been held together for a great number of years, and that the testator had contracted for the purchase of the equity of redemption in both. It is singular enough that this case was argued as falling within the rule of *Rose v. Bartlett*. The better opinion seems to be, that the rule which has been generally denounced as subverting the intention of testators will not be carried beyond its letter. The question, indeed, as we shall presently see, cannot arise under a will made or republished since 1837.

Whether term of years will pass with copyholds of inheritance.

The second branch of the proposition in *Rose v. Bartlett*, "that if the devisor hath no fee simple lands, the lease for years passeth," has been the subject of little controversy, as it gives effect to what is generally the intention of the testator in all these cases.

Leaseholds will pass where there is no freehold.

It has even been held, (*t*) that where a man devised all his "*freehold* houses in Aldersgate-street," to *A* and his heirs, and he had some leasehold but no freehold houses there, the leaseholds passed; it being the plain intention of the will to pass *some* houses, and the word "*freehold*" should rather be rejected

"Freehold houses in A." extended to leaseholds.

(*q*) *Sheffield v. Mulgrave*, 5 T. R. 571,
2 Ves., Jr., 526.

(*s*) 2 W. Bl. 1301.

(*g*) *Fitzroy v. Howard*, 3 Russ. 225.

(*t*) *Day v. Trig*, 1 P. W. 286; *Doe d. Dunning v. Lord Cranstoun*, 7 M. & Wels. 1.

(*r*) *Weigall v. Brome*, 6 Sim. 99.

Also since 1
Vict., c. 26, §
24.

than the will rendered void. [And as such a gift points to a specific property as then belonging to the testator the construction of it is not affected by section 24 of 1 Vict., c. 26.] (u)

The exclusion of leaseholds from a general devise, where the *testator has freeholds, founded as it is on a distinction purely technical, has been considered to militate so strongly against intention, that this rule of construction has been abrogated by the act 1 Vict., c. 26, § 26 of which provides, that a devise of the land of the testator or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would (x) describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

[The burden of proof is thus shifted to those who assert that leaseholds do not pass by a devise of "lands;" and the proof must appear on the will itself. The subject was much discussed in *Wilson v. Eden*, (y) where a testator, after bequeathing his personal estate to A absolutely, devised all his messuages, lands, tenements and hereditaments situate at or near W., and other specified places in the county of D., and at other places in the county of Y., and all other his real estates in the said counties and elsewhere in Great Britain, to uses in strict settlement in favor of A and his issue. Lord Langdale, M. R., thought that renewable chattel leaseholds situate near W., and contiguous to, and occupied with, the freeholds, were not included in this devise: not only were uses in strict settlement inapplicable in their integrity to leaseholds, but the ambiguity of the word "land" was removed by the subsequent words "other real estates." So that the case did not come within the act. (z) But on a case from Chancery the Courts of Exchequer and Q. B. successively

(u) *Nelson v. Hopkins*, 21 L. J., Ch. 410. As to § 24 of 1 Vict., c. 26, see *ante* ch. X.

(y) 11 Beav. 237, 5 Ex. 752, 14 Beav. 317, 18 Q. B. 474, 16 Beav. 153.

(x) *I. e.*, would before the act, see judgment in *Wilson v. Eden*, 5 Ex. 752.

(z) See also per K. Bruce, V. C., *Parker v. Marchant*, 2 Y. & C. C. C. 282.

came to the opposite conclusion. Lord Campbell observed that if (as was admitted) the devise of lands at or near W., taken by itself, was within the act, (a) he could not understand *why it was the less so because of the use of the subsequent words. Accordingly, it was decided by Sir J. Romilly that the leaseholds passed; he remarked that though general words might be cut down by the effect of previous enumeration, yet it was new to him to say that those general words cut down the prior enumeration.

But in *Prescott v. Barker*, (b) a testator having freeholds in the county of B., and freeholds and leaseholds in the county of M., devised his "mansion house, land and hereditaments in the counties of B. and M., and all other lands and hereditaments in England," to uses in strict settlement. During the minority of any tenant in tail by purchase, the trustees, after providing for his maintenance, were to accumulate the rents, and if he attained majority or died leaving issue inheritable under the entail, to pay the accumulations to him; if not, to invest them in the purchase of freehold lands, tenements and hereditaments, to be settled to the same uses as were by the will declared of the said hereditaments thereinbefore devised in strict settlement. A power of sale and exchange was given to the trustees, and they were to invest money arising thence in the purchase of freehold lands or hereditaments, to be settled to the same uses, or of leaseholds or copyholds convenient to be held therewith, the leaseholds and copyholds to be settled on corresponding trusts, but so that the leaseholds should not vest absolutely in a tenant in tail by purchase unless he attained majority, but if he died under age, should devolve as if they had been freeholds. And the testator bequeathed the residue of his personal estate upon trusts corresponding to the uses of the hereditaments devised in strict settlement, with a similar proviso to prevent the absolute vesting of it in any tenant in tail of those hereditaments by purchase who should die under age. It was held that the leaseholds in the county of M. passed not by the devise of lands, &c., in strict settlement, but by the residuary bequest, and therefore did not vest absolutely in a tenant in tail by purchase dying under age.

(a) It is stated in the report that seventy-two acres of the leaseholds were on the northern side of a high ridge, the greater portion being on the southern side, and that the former were two miles from the house and estate at W. It is not stated

whether they were disconnected. If they were, it might be a little difficult to reconcile the decision as to the seventy-two acres with *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453.

(b) L. R., 9 Ch. 174.

It was admitted that after *Wilson v. Eden* (with which in this respect the court did not seem perfectly satisfied), the uses in strict settlement were not alone sufficient to exclude the leaseholds from the devise: but whereas (said Lord Selborne) in that case there was a gift of land in strict settlement to one set of persons, and a gift of the personal estate absolutely to another person, (c) here there was on the whole will the most perfect evi*dence of intention to keep the whole estate, personal as well as real, together. Whenever leaseholds or personal property were expressly dealt with, they were subjected to a proviso that they should not vest absolutely in any tenant in tail by purchase who should die under age; whereas, if leaseholds passed by the devise in strict settlement, they vested absolutely in the first tenant in tail on his birth (for in this devise there was no such proviso); a result which it was moreover difficult to reconcile with the direction that during the minority of such tenant in tail the trustees should accumulate the rents, and in case he died under age invest them in the purchase of *freeholds* to be settled to the same uses as the devised freeholds—a direction which would in the event mentioned take them away from the tenant in tail.

In *Wilson v. Eden*, Lord Langdale was clearly of opinion, and (for the purpose, at least, of the ultimate decision) it was assumed by the other judges, that the act had not the effect of making leaseholds pass by a general devise of “real estate.” And in *Turner v. Turner*, (d) the point appears to have been so decided by Sir J. Parker, V. C. The testatrix in that case had no freeholds; but since the act this is no test. It is remarkable that the question, whether a devise of real estate (generally) would have passed leaseholds if the testator had no freeholds, appears never to have distinctly arisen before the act. (e)

But if the devise were of “real estate at A,” there can be little doubt that leaseholds at A would have passed under the old law if the testator had had no freeholds there; and notwithstanding that the words appear rather to point to

General devise of “real estate,” where no freeholds.

(c) This is not quite accurate: see the case *sup.*

(d) 21 L. J., Ch. 843, 20 L. T. 30. In *Gully v. Davis*, L. R., 10 Eq. 562, leaseholds were held to pass by a general devise of “real estate.” There were no freeholds; but how is this material since

§ 24 of the act? Moreover, the case turned on the admission (by demurrer) that the testator thought his leaseholds were freeholds: whether it was right to admit such a fact as evidence on a question of construction, *qu.*

(e) See *ante* p. *669, n. (b).

specific property, it seems to have been assumed since the act, that this is a "general devise" within the meaning of § 26.

Thus, in *Moase v. White*, (f) a testator having freeholds and long leaseholds at E., and long leaseholds but no freeholds at W., devised and bequeathed the residue of his real and ^{*Moase v. White.*} personal estate, in trust to convert his "residuary personal estate (except leaseholds)," and out of the income thereof and "the rents and profits of his real estate" to pay a life annuity to his wife and *accumulate the surplus: after her death, "as to all his real estate at E. and W.," in trust for J. and his issue in strict settlement. And "as to his leasehold messuages, lands and hereditaments at M." in trust "as nearly as the different tenure would allow according to the limitations thereinbefore declared of his real estate at E. and W.," with a proviso to prevent his leaseholds vesting absolutely in any tenant in tail dying under age. After the death of his wife "the residue of his real estate, including the residue of his leasehold estate," was to be sold, and the produce, with the produce of his residuary personalty, divided among the children of his sister. It was argued that the leaseholds at E. and W. did not pass by the gift of real estate in those places, for that the expression "my personal estate except leaseholds" showed that the testator considered leaseholds to be personal and not real estate. But it was answered, that having no freeholds at W., he must necessarily have intended his leaseholds there to pass as "real estate," and that such would have been the construction even before the act: the attempt to show that he considered leaseholds not to be real estate therefore failed. The act then came in, and made the devise operate also on the leaseholds at E. Sir J. Bacon, V. C., held that the leaseholds at E., as well as those at W., passed as "real estate" in those places, and not as parts of the residuary personal estate.

And leaseholds will still, as before the act, pass even as "freehold," if the devise is clearly specific in form, and the testator has at the date of his will no freehold property to answer the description.] (g)

Specific devise of "freehold" where no freehold.

(f) 3 Ch. D. 763. See also *Best v. Standeven*, W. N. 1872, p. 44.

(g) *Nelson v. Hopkins*, 21 L. J., Ch. 410. In *Stone v. Greening*, 13 Sim. 390, testator began by devising "all his real estates and all his leasehold estates" to trustees, in trust "as to his freehold messu-

age, farm lands and hereditaments in the county of B." in one way, and as to "his personal estate" in another: showing that he did not understand leaseholds to be included in "real estates," much less in "freehold." But the case was heard as a short cause.]

V.—The remaining question is, whether a devise or bequest in general terms will operate as an execution of a power of appointment over real or personal estate.⁵ This point, in regard to the former, depends on the fact which, we have

General devise
operates as
an appoint-
ment—when.

5. An intention to execute the power must appear, although it need not be expressed, *Blagge v. Miles*, 1 Story C. C. 426; *Den v. Crawford*, 3 Halst. 103; *Cue-man v. Broadnax*, 8 Vr. 508; *White v. Hicks*, 33 N. Y. 383; *Drusadow v. Wilde*, 63 Penna. St. 170; *Bingham's Appeal*, 64 Penna. St. 345; *Allison v. Kurtz*, 2 Watts 185; *Coryell v. Dunton*, 7 Penna. St. 530; *Keefer v. Schwartz*, 47 Penna. St. 503; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Dunning v. Van Dusen*, 47 Ind. 423. In the language of Story, J., in *Blagge v. Miles*, *supra*, "Three classes of cases have been held to be sufficient demonstrations of an intended exercise of a power; (1) where there has been some reference in the will or other instrument to the power; (2) or a reference to the property which is the subject on which it is to be exercised; (3) or where the provisions in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity, in other words, it would have no operation except as an execution of the power." So, *Ewing, C. J.*, in *Den v. Crawford*, *supra*: "It is a rule that although it is not necessary to the due execution of a power that it should be recited or expressly referred to, yet there must be something to show that the party intended to execute it." So, *Sharswood, J.*, in *Drusadow v. Wilde*, *supra*: "The authorities are clear and consistent in holding that where this is the case" (the subject of the power is particularly described), "the power will be effectually exercised, though the instrument does not mention or refer to it as being in execution thereof. It is only when the words of the will may be satisfied without supposing an intention to execute the power that it is no execution." See fur-

ther Judge Story's remarks in *Blagge v. Miles*, *supra*, p. 446: "The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute a power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds, demonstrating the intention." And see the remarks of *Agnew, J.*, in *Bingham's Appeal*, *supra*, p. 349: "It may be admitted that the intention of the donee of a power is the true criterion to determine its execution. But this intention must appear in the instrument itself. In Pennsylvania the rule is that the instrument must refer to the power to be executed, or actually dispose of the subject of it: *Wetherill v. Wetherill*, 6 Harris 265; *Thompson v. Garwood*, 3 Whart. 287; *Meconkey's Appeal*, 1 Harris 259; *Keefer v. Schwartz*, 11 Wright 508; *Commonwealth v. Duffield*, 2 Jones 280; *Heffernan v. Addams*, 7 Watts 116. When the donee of a power refers to it, or when he disposes of the subject of it by such a description as identifies it, the intent to

seen, determines the applicability of such a devise to leaseholds, namely, whether there is any other subject for its operation. Thus, if a testator, by a will made before, and not republished on or since the 1st of January, 1838, devises all his hereditaments or real estate, and it appears that he had no real estate at the time of its execution, *but that he had a testamentary power over real estate, the devise will operate as an appointment under such power. (h) [And a devise by a married woman who was not shown to be entitled at the date of her will to any separate real estate (upon which ^{Will of feme covert.} alone the will could have operated as a devise of *property*), took effect as an appointment under such a power. (i) Parke, B., said it could not be intended that she had other property which she could devise, being a married woman.]

On the other hand, if the testator had real estate on which the will could operate, it will be presumed, that the devise was made with a view to such property, and not as an exercise of the power, (k) even though the terms descriptive of the subject-matter of disposition are rather more extensive than is required to comprise the testator's own property. Thus, where a testator having real estate, and also a power

execute it is free from uncertainty. A third mode of ascertaining the intention is, when the instrument of execution cannot have any operation except on the ground that the donee intended to execute his power; as where it is a power to dispose of real estate and he has none of his own. It is manifest the third mode is rather a legal presumption than a manifestation of intention—a positive inference drawn from a negative fact. But positive legal presumptions cannot judicially arise upon equivocal or uncertain conditions of fact. Hence, the mere fact that the bequests in a will exceed the testator's estate cannot draw after it an intention to execute the power." And it was held in *White v. Hicks*, 33 N. Y. 383, that the circumstances of the testator's property were admissible evidence of such intention, and that it was sufficiently shown by the fact that the dispositions in his will greatly exceeded his property apart from that embraced in the power. But see, *contra*, *Bingham's Appeal*, 64 Penna. St.

345. But if the maker of the instrument is seized of an estate which will pass without an execution of the power, and no reference is made to the power, the presumption will be that he intended to convey that estate and no more. *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124.

[(h) *Wallop v. Lord Portsmouth*, Sugd. Pow., p. 916, 8th ed.]; *Standen v. Standen*, 2 Ves., Jr., 589; [affirmed in D. P., 6 B. P. C. Toml. 193, *nom.* *Standen v. Macnab*. But an argument against such an operation is furnished if the testator has by the same will expressly exercised other powers vested in him; *Att.-Gen. v. Vigor*, 8 Ves. 294.

(i) *Curteis v. Kenrick*, 3 M. & Wel. 461, 9 Sim. 443.]

(k) *Sir Edward Clere's Case*, 6 Co. 176; *Ex parte Caswall*, 1 Atk. 559. [The burthen lies upon the party claiming under the alleged appointment to prove that the testator had no other real estate, *Doe d. Caldecott v. Johnson*, 7 M. & Gr. 1047.]

over real estate, devised all his "messuages, lands, tenements and hereditaments," the power was held not be exercised, though the property of the testator consisted of houses only. (*l*) It has also been decided, that where a testator who had freehold property, and a power over freeholds and copyholds, devised his freehold and copyhold estates, the devise operated as an execution of the power with respect to the copyholds, (there being no other property of this description on which it could operate,) but not as to the freeholds. (*m*)

And here it may be observed, that a clause of disposition, framed in general but rather equivocal terms, and not very distinctly comprising real estate, may not amount to an exercise of a power of appointment, though it might have been held to embrace realty to avoid intestacy. Thus, where (*n*) a testator, by a will attested by three witnesses, devised all his estate and effects of whatever denomination; Sir T. Plumer, M. R., held, that though these words would have passed any real estate of *which the testator might have happened to be seized, they did not demonstrate an intention to exercise a power over real estate.

The principles regulating the construction of general devises, in regard to the subject now under consideration, for the most part apply to devises of lands circumscribed by locality. Thus, if a testator devises all his lands in the parishes of A and B, having lands in A only, and a power over lands in A and also in B, the devise will exercise the power over the lands in B, but not the power over those in A. (*o*) And where a testatrix, being seized in fee of an undivided moiety of lands in Surrey, the other moiety in which had been limited to her for life, with remainder to such uses as she by deed or will should appoint, devised all her freehold estates in the county of Surrey, this devise was held to be satisfied by embracing the first-mentioned moiety, and did not operate as an appointment of the second. (*p*)

General devise which would operate on real estate, not necessarily sufficient to exercise power.

As to devises of property answering to a certain locality.

(*l*) *Hoste v. Blackman*, 6 Mad. 190.

(*m*) *Lewis v. Llewellyn*, T. & R. 104. [But if the estate subject to the power be specifically dealt with, the power, though not referred to, will be executed, *Davies v. Davies*, 4 Jur. (N. S.) 1291.]

(*n*) *Jones v. Curry*, 1 Sw. 66. [As to which see *Sug. Pow.*, p. 342, 8th ed.]

(*o*) *Napier v. Napier*, 1 Sim. 28.

(*p*) *Roake v. Denn*, 4 Bli. (N. S.) 1. See also *Doe v. Roake*, 2 Bing. 497; *Denn v. Roake*, 5 B. & Cr. 720; [*Wildbore v. Gregory*, L. R., 12 Eq. 482.]

The ground on which a general devise has been held to operate as an appointment of real estate, it is obvious, does not apply to personalty; (q) for as a will of personal estate comprises whatever property of this description a testator dies possessed of, without regard to the period of its acquisition, it is not necessarily to be presumed that the testator had any specific property in his view when he made it: and therefore, even if it should happen that the testator had no other disposable property at the time of making his will, or at his death, than the subject of the power, (r) or that its exclusion from the will will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an appointment under the power. (s)

General bequest does not, under old law, exercise power over personalty.

And the circumstance that the donee being a married woman has no general testamentary capacity (but who may have separate estate, which is disposable by will) has been held not to constitute a ground for varying the construction. (t)

Distinction where the testatrix is *feme covert*.

[But it must be observed that in all the cases where it was so held it appeared *that in fact the married woman at the time of making her will had separate estate which would or might pass by the general bequest; and it seems that unless this is proved affirmatively the bequest will operate as an appointment. (u) Nor is this unreasonable: for though after-acquired separate estate would also pass by the will, the acquisition of it (even now that the means of acquiring it are multiplied by the married women's property act, 1870), cannot be assumed to be in the contemplation of the married woman as confidently as the future acquisition of personalty may be, and is, assumed to be within the view of a male or unmarried donee. But the mere fact that the married woman has or has not, *at the time of her death* other disposable

(q) Leaseholds, of course, are undistinguishable from other personal estate in this respect, though in some cases they have most inconsiderately been treated as governed by the same principle as devises of freehold estates. See *Grant v. Lynam*, 4 Russ. 296, [and *Tanner v. Elworthy*, 4 Beav. 487.]

(r) *Buckland v. Barton*, 2 H. Bl. 136; *Langham v. Nenny*, 3 Ves. 467; *Croft v. Sleg*, 4 Ves. 60; *Bradley v. Westcott*, 13 Ves. 445.

(s) *Andrews v. Emmot*, 3 B. C. C. 297; *Bennett v. Aburrow*, 8 Ves. 609.

(t) *Lovell v. Knight*, 3 Sim. 275; [*Lempriere v. Valpy*, 5 Sim. 108; *Evans v. Evans*, 23 Beav. 1.

(u) *Shelford v. Acland*, 23 Beav. 10, (which was decided on this ground, though the will was since 1837, and was therefore a good appointment under 1 Vict., c. 26, § 27); *Att.-Gen. v. Wilkinson*, L. R., 2 Eq. 816.]

property ought not to affect the question whether the will was intended to be an execution of the power.]

Of course, if an intention to exercise a power by a general or residuary bequest, can be collected by implication from the whole instrument, such construction will prevail; (x) but it has been held, that the bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy. (y) For the same reason, the mention of "money in the funds" in a general bequest of personal estate, and the fact of the testator having no stock of his own at the date of the will, will not cause such bequest to operate as an appointment of stock over which the testator had a general power of disposition. (z)

On the other hand, [a gift of pecuniary legacies, followed by a general bequest of "all the rest and residue of *my* bank stock, goods, &c., and all other property, &c., excepting £50 of *my* bank stock," contained in the will of a testator who had a power to appoint a sum of bank stock, has been held] to denote an intention to include in such bequest the residue of the stock which was subject to the power, [and to charge it with the legacies. (a)] *Here, the expression, *my* bank stock, joined with the other terms in the will, was *prima facie* evidence that the testator was pointing to a specific existing fund; parol evidence was therefore admissible, to show whether he had any such fund of his own to which the bequest was applicable; and this being proved in the negative, the decision was inevitable. And it may be stated as a general rule, that where the bequest is on the face of the will thus specific, and it is ascertained by parol (in that case legitimate) evidence that the testator has no other such fund, the power

(x) *Hunloke v. Gell*, 1 R. & My. 515.

(y) *Jones v. Tucker*, 2 Mer. 533; [*Davies v. Thorns*, 3 De G. & S. 347.]

(z) *Webb v. Honnor*, 1 J. & W. 352.

(a) *Walter v. Mackie*, 4 Russ. 76; [In *re Davids' Trusts*, Johns. 495. In the former case it was also decided that leaseholds subject to the same power passed by

the words "other property." This part of the decision was questioned by *Pepys, M. R.*, *Hughes v. Turner*, 3 My. & K. 697; but see *Standen v. Macnab*, 6 B. P. C. Toml. 193, decreeing the *personal* estate to pass with the real; and see *Sugd. Pow.* 321, 8th ed.; *Harvey v. Stracey*, 1 Drew. 73.

will (other things attended to) be well executed. (b) Beyond this,] of course, parol evidence cannot be adduced to influence the construction in any of these cases. (c)

[Again, where (d) a testatrix bequeathed certain pecuniary legacies and gave "all the residue of her property of whatever kind and over which she had any power of appointment or disposition," it was held, on a principle discussed in another chapter, (e) that the legacies were charged on the whole residue, including the subject of the power, out of which, therefore, the pecuniary legacies were payable in due order. And where a testatrix with a special power bequeathed certain legacies to strangers, and then gave specific parts of the fund subject to the power to objects, and "as to all the residue of her personal estate whatsoever and wheresoever after payment of her debts, funeral and testamentary expenses, *and the before-mentioned legacies*," she gave the same to persons who were also objects of the power, it was held, by Sir L. Shadwell, V. C., that the remainder of the fund, which was the subject of the power, was well appointed by the residuary gift; the funds over which she had the power being *alone* made (by the gift of the specific parts) applicable to satisfy some of those legacies. (f) But the V. C. thought that if it had been a gift of all the residue simply, the power would not have been an exercise of the power. (g)

A general devise of "all *my* real and personal estate and *effects whatsoever whereof I have power to dispose," or the like, will generally be taken not as a mere superfluous mention of the ordinary powers which, as owner, the testator has of disposing of his own property, but as a reference to any power which he may possess of appointing property not strictly his own.

Devise of all that testator has power to dispose of, executes a power.

(b) *Sayer v. Sayer*, 7 Hare 381, 3 Mac. & G. 607; *Horwood v. Griffith*, 4 D., M. & G. 708; *Rooke v. Rooke*, 2 Dr. & Sm. 38; In re *Gratwick's Trusts*, L. R., 1 Eq. 177.]

(c) *Standen v. Standen*, 2 Ves., Jr., 589. And as to the subject generally, see further Sugd. Pow., 8th ed., 289, 2 Chance on Powers 83.

[(d) *Gainsford v. Dunn*, L. R., 17 Eq. 405. This case seems inconsistent with, but would probably be preferred to, *Lowe*

v. Pennington, 10 L. J., Ch. 83 (*cor. Cottenham, C.*)

(e) Ch. XLV., § 1.

(f) *Elliott v. Elliott*, 15 Sim. 321. And see In re *Comber's Trusts*, 14 W. R. 172; and *Reid v. Reid*, 25 Beav. 469, where the subject of a power was held to pass by a general bequest by virtue of an exception therefrom of a specific part of the subject.

(g) See acc. *Butler v. Gray*, L. R., 5 Ch. 26.

Real (*h*) and personal (*i*) property here stand on the same footing, and the power is held to be executed whether the gift would or would not otherwise be inoperative. A contrary intention (which will of course prevail if shown by the will) is not inferred from the circumstance of the testator having in some respects exceeded his power, as, (where the power is special) by directing his debts to be paid out of the subject of disposition; (*k*) or by giving to non-objects; (*l*) or by giving the object an absolute interest, the power authorizing the gift of a life estate only. (*m*)

Whether the testator had or had not another power, which the provisions in question do not exceed, is of little moment. If he had not, the exceeded power, being the only one, is necessarily pointed at; (*n*) if he had, the provisions which are excessive as to one may be referred exclusively to the other, and so both powers may be held well executed. An example of the latter kind is found in *Thornton v. Thornton*, (*o*) where a testator, having distinct powers over separate funds, one to appoint among his children subject to an interest in his wife during widowhood, the other to appoint to his wife a life interest in a fund which, subject thereto, was held in trust for his children equally at twenty-one, "gave, devised and bequeathed all his property over which he had any disposing power" in trust for his wife for life for her separate use, remainder to his children equally at twenty-one, and on failure of such children over; and it was held, by Sir R. Malins, V. C., that *reddendo singula singulis* both powers were well executed.

But a devise of "all my real estate over which I have any disposing power" by a testator who had real estate of his own, was held not to be an exercise of a special power, where, if it had been, it would have defeated certain interests under the settlement creating the power, which interests the testator treated as to take effect after his death. (*p*) And where a testatrix, *after specifically devising an estate of her own] devised "all other the lands which she had power to dispose of," it was held, that a share

Unless a contrary intention appears.

(*h*) *Bailey v. Lloyd*, 5 Russ. 330; *Cowx v. Foster*, 1 J. & H. 31.

(*i*) *Ferrier v. Jay*, L. R., 10 Eq. 550.

(*k*) *Bailey v. Lloyd*, *Cowx v. Foster*, *Ferrier v. Jay*, *sup.*

(*l*) *Pidgely v. Pidgely*, 1 Coll. 255.

(*m*) *In re Teape's Trusts*, L. R., 16 Eq.

442. *Clogstoun v. Walcott*, 13 Sim. 523, and the *dicta* in *Hope v. Hope*, 5 Gif. 13, *contra*, are overruled.

(*n*) *In re Teape's Trusts*, *Cowx v. Foster*, *sup.*

(*o*) L. R., 20 Eq. 599.

(*p*) *Cooke v. Cunliffe*, 17 Q. B. 245.]

of money to arise by sale of lands, over which money she had merely a power of appointment, did not pass. (q)

[And a power of revocation and new appointment requires some stronger evidence of an intention to exercise it than is required by a power of appointment. Thus, in *Pomfret v. Perring*, (r) where a testatrix having a power under her marriage settlement, and another under her father's will, executed the latter by deed reserving a power of revocation and new appointment; and then by will gave and appointed all the real and personal estate which she might at her death be entitled to, or by virtue of the power contained in the settlement *or otherwise* have power to appoint; it was held that the power of revocation and new appointment was not exercised, though if the will had shown an intention to exist, which, without so construing the words, could not be effectuated, they might have been so construed.]

General reference to powers does not include power of revocation.

The preceding doctrines, however, [so far as they relate to *general* powers,] do not apply to wills made or republished since 1837, the act 1 Viet., c. 26, § 27, having provided, that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint *in any manner he may think proper*, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

What amounts to an appointment in wills made or republished since 1837.

[A power is not the less general within the meaning of this section, because it is to be executed by will only, and not by deed. The words "in any manner he may think proper" refer *to the extent of the power in regard to the objects, and

Power general though only testamentary.

(q) *Adams v. Austen*, 3 Russ. 461. 2 Ves., Jr., 589.

[But the lands were still unsold at the date of the will; see *Standen v. Standen*, (r) 5 D., M. & G. 775.

not to the mode in which it is to be exercised. (s) But a general gift will not be deemed an exercise of a power of revocation and new appointment, unless the gift would otherwise be wholly inoperative. (t)

General pecuniary legacies are "bequests of personal property described in a general manner," and operate under this section as appointments, so far as the subject of the power is required in aid of the testator's own estate for payment of the legacies. (u) To the same extent a direction to pay the testator's debts will operate as an appointment. (x) And although in the cases where these points were decided executors had also been appointed, that circumstance does not appear to be essential. (y) "It seems not unreasonable to hold that a testator having a general power and directing a certain application of his property must be taken in all cases to exercise the power to the extent to which the direction is effectual." (z) But "it has not yet been decided that an appointment of an executor without more would make the fund assets: and so to hold would appear to give a very unnatural construction to the section." (a)

The effect of this section is to reverse the old rule and to throw on those who deny that a general devise or bequest executes a general power the burden of proving by what appears on the face of the will the testator's intention that it shall not do so. (b) The fact that an appointment has been actually made, will not show an intention to exclude the appointed property from a general residuary gift, where the appointment fails by lapse, (c) or through uncertainty. (d) And where the property was overridden by a power to sell and reinvest to the same uses, and, after the execution of the will, the property was sold accordingly: it was held, that the express appointment was adeemed, but that the substituted property

Pecuniary legacies are appointments within § 27; —and directions to pay debts.

How a contrary intention may appear.

(s) *Hawthorn v. Shedden*, 3 Sm. & Gif. 303; *Lefevre v. Freeland*, 24 Beav. 403; *In re Powell's Trusts*, 39 L. J., Ch. 188.

(t) *Palmer v. Newell*, 20 Beav. 38.

(u) *Hawthorn v. Shedden*, 3 Sm. & Gif. 293; *Wilday v. Barnett*, L. R., 6 Eq. 193; *In re Wilkinson*, L. R., 8 Eq. 487, 4 Ch. 587; notwithstanding *Hurlstone v. Ash-ton*, 11 Jur. (N. S.) 725.

(x) *Att.-Gen. v. Brackenbury*, 1 H. & C. 782; *Laing v. Cowen*, 24 Beav. 112.

(y) *Per Wickens, V. C., In re Davies' Trusts*, L. R., 13 Eq. 166.

(z) *Ib.*

(a) *Ib.* *Stuart, V. C., thought otherwise*, 3 Sm. & Gif. 304.

(b) *Walker v. Banks*, 1 Jur. (N. S.) 606.

(c) *In re Spooner*, 2 Sim. (N. S.) 129.

(d) *Bernard v. Minshall*, Johns. 276. See also *Hickson v. Wolfe*, 9 Ir. Ch. Rep. 144.

passed by the residuary devise in the will. (e) The effect of the residuary gift upon the void or imperfect particular appointment is analogous to its effect upon a *void or imperfect particular bequest: and the suggestion of a learned judge, (f) that the gift of a partial interest (as a life estate) in the subject of a power is so absolutely inconsistent with an appointment of the entire interest to the same person as to show an intention to exclude it from a residuary bequest to that person, would probably not be followed.

And in *Hutchins v. Osborne*, (g) where leaseholds were settled on the testator's wife for life, and after her death as he should appoint, and in default of appointment for (in effect) his next of kin by statute, it was held that a general residuary gift of the testator's property "subject, as to such parts thereof as are comprised in my marriage settlement, to the said settlement and the trusts thereby declared, and which settlement I hereby ratify and confirm in all respects," operated as an execution of the power notwithstanding the reference to the settlement, which was explained by the wife having a life interest in the property.

On the other hand, in *Moss v. Harter*, (h) where by voluntary settlement personalty was settled as the settlor should appoint generally, and in default on himself for life, and after on several named persons. The settlor then under his power executed a deed appointing part of the fund; and afterwards made a will by which he bequeathed his residue "not otherwise effectually disposed of." It was held by Sir J. Stuart, V. C., that this bequest did not include the unappointed portion of the settled fund, on the ground that the whole fund was in fact "effectually disposed of" by the partial appointment, and, so far as

Moss v. Harter.
Effect where
appointment
would defeat
testator's own
settlement.

(e) *Gale v. Gale*, 21 Beav. 349. But as to the ademption, *vide ante* p. *163.

(f) *Wood, V. C., Scriven v. Sandom*, 2 J. & H. 745. See *Hopewell v. Ackland*, *Scott v. Alberry*, *Roe v. Gilbert*, *Day v. Dameron*, all stated in next chapter, where remainders in fee were held to pass by general residuary devises to the same persons to whom life estates in the same property were specifically devised in a former part of the will. See also *ante* p. *649, n. (z); p. *650, n. (e); and *Bush v. Cowan*, 32 Beav. 228.

(g) 4 K. & J. 552, 3 De G. & J. 142;

see also, as to the confirmation of the settlement, *Lake v. Currie*, 2 D., M. & G. 536. And see *Atherton v. Langford*, 25 Beav. 5, where an expressed intention that lands over which the testator had a power should not be included in his will, but should go according to the settlement, was held not to prevent a share in the lands vested in the testator in default of the exercise by him of the power from passing under the residuary gift in his will.

(h) 2 Sm. & Gif. 458.

that did not extend, by the limitation in default contained in the settlement. It was argued strongly against this construction that the words "not otherwise effectually disposed of" must be read "not otherwise *by the will* effectually disposed of:" but the V. C. thought that this would be to violate the express language of the will. He added, that it was probably the intention of the legislature that § 27 should apply only to cases like *Cox v. Chamberlain*,⁽ⁱ⁾ *where the power was in such ample terms as to amount to absolute property. The terms of the section, however, are certainly of more extensive import.

With reference to this decision, Lord St. Leonards says,^(k) "The case is not without difficulty; but where the property is, as in this case, settled by the testator himself upon others in default of appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will which can be satisfied by other property, to be an execution of the power." Although the act requires that, to be effectual, the intention not to execute the power shall appear *by the will*, that cannot mean to the exclusion of the instrument creating the power. The will, if it is to exercise the power, becomes part of the instrument creating the power, and both must be read together to collect the intention truly. This must be borne in mind when the question (noticed in a former page)^(l) is, whether by the combined operation of §§ 24, 27 a general power is exercised by a previously executed will.

Thus, where ^(m) a testator specifically devised certain freehold, copyhold, and leasehold estates, and gave all other the real and personal estate which he should be entitled to at his death, or over which he had or should have any power to dispose, on certain trusts; then, by voluntary settlement, dated August, 1862, he conveyed the specified freehold estates and all other his freehold estate to C and A and their heirs in trust for himself for life, remainder to E for life, remainder as he "by his last will or any codicil thereto should appoint," and in default for E in fee; and he assigned his leasehold and personal estate on trusts for the benefit of E. In November, 1862, by testamentary instrument commencing

Remarks on
Moss v. Harter.

Settlement
after will.

(i) 4 Ves. 631.

(k) Sug. Pow., p. 305, 8th ed.

(l) P. *336.

(m) Pettinger v. Ambler, L. R., 1 Eq.

510. See also *In re Ruding's Settlement*, L. R., 14 Eq. 266, the authority of which however, is impaired by the admission of parol evidence of intention.

"This is my last will," he, in pursuance of the power in the settlement, charged the freeholds with an annuity, and devised all his copyholds to C, and appointed C and A executors, but made no other disposition. Both wills had been proved. It was held by Lord Romilly, M. R., that he must look at the settlement and the testamentary instruction together to understand the matter properly; and seeing that the testator had made a "last will" after the date of the settlement, he held that the previous will had no operation under *the power; though if there had been no such subsequent will he would have held that the former will was an execution of the power—meaning, apparently, that this would, in that event, have been *de facto* the "last will."

Where, by marriage settlement, a testatrix had power to appoint estates A and B, and made her will reciting the power and giving A to one person, and "all other the heredita- Particular residue is not within § 27. ments comprised in the settlement not hereinbefore disposed of" to another; she then by codicil revoked the appointment of estate A and appointed it on charitable trusts, which were void. It was held that estate A did not pass by the appointment of "all other hereditaments," &c., for that this was not a general or residuary gift, but clearly specific. (n) And a gift by a married woman of the "residue of her separate property" was, of course, held not to include a lapsed share of a fund over which she had a general power. (o)

If the residuary gift itself fail either wholly or partially, and either through lapse, or through an original incompleteness of disposition, it would seem on principle that the property Effect where residuary gift fails. included under the power ought to go as if there had been no appointment, or (as the case may be) an incomplete appointment. (p) And the point was so decided by Sir J. Wickens, V. C., in a case where the residue was given direct to the beneficiary, without the intervention of a trustee. (q) But where the residue is given (and the subject of the power is thus appointed) to the donee's executors, (r) or to other persons (s) as trustees, it has been held that the subject of the power is

(n) In re Brown, 1 K. & J. 522. And see Springett v. Jennings, *ante* p. *651.

(o) Wilkinson v. Schneider, L. R., 9 Eq. 423; 429.

(p) Per Wickens, V. C., L. R., 13 Eq. 166.

(q) In re Davies' Trusts, L. R., 13 Eq.

163. The testatrix appointed an executor.

(r) Chamberlain v. Hutchinson, 22 Beav. 444. See also Brickenden v. Williams, L. R., 7 Eq. 310; Wilkinson v. Schneider, L. R., 9 Eq. 423. Cf. Bristow v. Skirrow, L. R., 10 Eq. 1.

(s) Lefevre v. Freeland, 24 Beav. 403.

thus taken completely out of the instrument creating the power, and made part of the appointor's own estate, that the trusts take effect as simple bequests out of that estate, and that if any of them fail, the undisposed-of interest belongs to the next of kin of the appointor. Sir R. Kindersley thought the case of a married woman appointor was distinguishable; since, as part of her estate, she would be incompetent to dispose of it, and he could not impute to her an intention of so dealing with the fund as to make all the trusts declared by her nugatory; the trusts must *have been intended to take effect under the power, and consequently whatever was ill-appointed went as in default of appointment. (t) But Sir W. James, V. C., disregarded the distinction. (u) He said it was not a question of intention at all, it was a question of resulting trust, if anything, and the fund resulted for the benefit of those who would be entitled if it were the appointor's property,—which assumes that the fund *has* by the appointment become part of the appointor's estate.

The applicability of this section to the construction of the wills of married women has been disputed, but without success. Their testamentary capacity is not enlarged by the statute, but their wills, when made, have the benefit of the more liberal rules of interpretation laid down by it. (x)

In *Lake v. Currie*, (y) it was contended that § 24 of the wills act, which makes the will speak with regard to the real as well as the personal property comprised in it from the date of the testator's death, prevents a general devise of real estate from operating under § 27 as an exercise of a general power over lands, although the testator has no other lands when he makes his will, on the ground that any lands which he may afterwards acquire and hold at his death will pass by such a devise, and that so this case is assimilated to a general bequest of personalty before the act. But to this Lord St. Leonards answered—"So far from operating in that way, the statute evidently meant to enlarge and give greater effect to dispositions by will. To hold that the old law is restricted and that cases, which before the late act would be considered a due execution of the power, are not so now, would, I think, be

1 Vict., c. 26,
§ 27, applies
to wills of
married
women.

Effect of the
act on general
powers over
realty.

Lake v. Currie.

(t) *Hoare v. Osborne*, 33 L. J., Ch. 586. *Thomas v. Jones*, 2 J. & H. 475, 1 D., J. & S. 63; *Noble v. Willock*, L. R., 8 Ch. 778, 7 H. L. 581.
(u) *Wilkinson v. Schneider and Brickenden v. Williams*, *sup.*

(x) *Bernard v. Minshull*, Johns. 276; (y) 2 D., M. & G. 536.

utterly incompatible with the whole scope of the act. The statute says, that the devise shall operate as an execution of the power 'unless a contrary intention shall appear by the will:' it is absolutely necessary, therefore, now to show a contrary intention to exclude the execution of the power, where under the old law you must, to give effect to the will, have shown an intention to exercise the power; the new law is therefore stronger for the appointees than the old law." The same reasoning will obviously apply in cases where the testator has lands of his own besides those which are subject to the power.

*Special powers to appoint in favor of a particular class, as children, (a) or kindred, (b) are not within this section, and the question whether such powers are executed by a general devise or bequest still depends on the old law; but with this exception, that if the question arises with regard to a special power over realty, an argument against its execution founded on § 24, as in *Lake v. Currie*, will not be amenable to the answer furnished in that case by § 27, for the latter section does not apply to such a power.]

Does not
apply to
special
powers.

It will be remembered that all peculiarities in the execution of testamentary appointments are abolished by § 10, which makes a will attested according to the statute sufficient for, as well as requisite to, the validity of all such appointments, without distinction.

Execution of
testamentary
appointments
under new law.

(a) *Cloves v. Awdry*, 12 Beav. 604; (b) *Hawthorn v. Shedden*, 3 Sm. & Gif. 306; *Pidgely v. Pidgely*, 1 Coll. 255; *Elliott v. Elliott*, 15 Sim. 321; *Cronin v. Roche*, 8 Ir. Ch. Rep. 103.

[*688]

*CHAPTER XXI.

DEVISES BY MORTGAGEES AND TRUSTEES.

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| <p>I. <i>In regard to the beneficial Interest in Mortgages.—As to the Extinction of the Charge by Union of Character of Mortgagor and Mortgagee.</i></p> | <p>II. <i>Operation of General Devise on the Legal Estate of Mortgagee or Trustee.</i></p> <p>III. <i>Whether Devisee of Trustee can exercise the Powers given to the Trustee.</i></p> |
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As mortgages are of a complex nature, involving on the one hand a personal debt, with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.

I.—With respect to *the beneficial interest in the mortgage*, it is clear that a general devise of lands will not commonly have the effect of including it. (a)¹ The contrary, indeed, is laid down by a respectable writer, (b) but his position is not warranted by either authority or principle. The case of *Ex parte Sergison*, (c) cited by him, does not support it; for the devisee was executor and residuary *legatee*, and consequently entitled, *in that character*, to the beneficial interest in the mortgage; besides, the only question in the case related to the *legal estate* in the lands. (d) The position is opposed, too, by the established principle of equity, which considers the mortgagee as

Whether beneficial interest in mortgage will pass under devise of lands.

Principle governing the cases.

(a) *Strode v. Russell*, 2 Vern. 621, 3 Ch. Rep. 169, 2 Vent. 851, 3 P. W. 61; [*Casborne v. Scarfe*, 1 Atk. 605 and n. by Sanders, 2 J. & W. 194.]

1. A mortgage before foreclosure is personal property, and as such will pass to an executor, *Swift v. Edson*, 5 Conn. 531; *Fay v. Cheney*, 14 Pick. 399; *Asay v. Hoover*, 5 Penna. St. 35; 2 Redf. on Wills 124; 2 Washb. R. P. 134; *Kinna v. Smith*,

2 Gr. Ch. (N. J.) 14; *Smith v. Dyer*, 16 Mass. 23; *Demarest v. Wynkoop*, 3 Johns. Ch. 145. And it passes as personal property under a bequest of "all right, title, interest and estate that I have as mortgagee," *Martin v. Smith*, 124 Mass. 111.

(b) 1 Rob. on Wills, (3d ed.) 403.

(c) 4 Ves. 147, stated *post* p. *693.

(d) Mr. Roberts evidently confounds the two questions; his positions are applicable to neither.

holding the land in a fiduciary character only, and the estate as still substantially belonging to the mortgagor. The person taking the mortgaged lands therefore by devise or descent, from the deceased mortgagee, it is obvious, is a trustee for the person *entitled to the money or debt, by virtue of the will or otherwise (*e*), unless, of course, both these interests happen to unite in the same person.

Nor is it, I apprehend, universally true, that an express devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms. (*f*)

It is observable that in the cases cited in support of the doctrine referred to, *the testator was in possession* at the time, (*g*) and in most of them the operation of the devise was not called in question, the only point being as to the right of redemption. The fact of such possession, particularly where it has been of long continuance, and accompanied with acts of ownership, certainly strongly favors the supposition that the testator, in expressly devising the property, means to give the beneficial interest. Having himself enjoyed the property beneficially, he can hardly but intend that his devisee's enjoyment should be of the same nature, especially where it is given not to the devisee simply in fee, but to several persons consecutively for limited estates. (*h*) The testator, too, may be ignorant whether the right of redemption, on which the nature of the property depends, be barred or not, and may therefore choose to avoid using any expressions which might be construed into a recognition of it. (*i*) Indeed, in such cases there would be strong ground to contend that the beneficial interest would pass, even under a general devise of lands, especially if there were no other lands to satisfy the devise, a circumstance, however, which would be immaterial, in regard to a will which is governed by the *existing* law.

In *Martin d. Weston v. Mowlan*, (*k*) Lord Mansfield held that a copyhold estate, of which the testator was in possession as mortgagee,

(*e*) *Att.-Gen. v. Meyrick*, 2 Ves. 44.

(*f*) 1 Pow. Mortg. Cov. Ed. 409.

(*g*) *Clarke v. Abbott*, 2 Eq. Cas. Ab. 606, Barn. Ch. Rep. 457. In *How v. Vigiures*, 1 Ch. Rep. 32, this fact, though not stated, seems very probable, as the

object of the suit was to foreclose.

(*h*) *Woodhouse v. Meredith*, 1 Mer.

450.

(*i*) But now see statutes 37 and 38 Vict., c. 57, § 7.

(*k*) 2 Burr. 977.

did not pass under a devise of all his "lands, tenements and hereditaments, within and parcel of the manor of W.," the surrender to the use of the will referring to the property as subject to a condition of redemption and resurrender; and the will *containing a recital that the mortgagor stood indebted to him, *and giving her time for payment of the debt.* It appeared, moreover, that the testator was seized of other lands, also surrendered to the use of his will, in the manor of W.

In *Woodhouse v. Meredith*, (l) Sir W. Grant held that the testator's beneficial interest in leasehold property at K., of which he was in possession as mortgagee, and of which an assignment in trust for sale had been executed to him, passed under a devise of all his freehold, copyhold and leasehold messuages, farms, lands and tenements whatsoever and wheresoever, in the county of H. *and the town of K.*, to various limitations, the testator having no other than the mortgaged lands at K., though the will contained a subsequent devise of all estates vested in him as mortgagee or trustee, but which was satisfied by other lands of which the testator was seized as mortgagee. The same observation applied to the bequest of securities for money, which also occurred. (m)

It is observable that the M. R. considered, from the nature of the limitations and provisions in the will, (which consisted of successive estates for life, with an estate interposed in trustees to preserve contingent remainders,) that, if the property passed at all, it was the beneficial interest, and not the mere legal estate, which was disposed of.

But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect (n), for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will.

Beneficial interest in mortgage, held to pass under devise of lands in K.

Cases suggested in which devise of mortgage estate would not carry beneficial interest.

(l) 1 Mer. 450.

(m) But as to which, see next note.

(n) See judgment of Lawrence, J., in

Doe d. Freestone v. Parratt, 5 T. R. 652;

and Lord Eldon's in *Thompson v. Lawley*,

2 B. & P. 314.

[In *Bowen v. Barlow* (o) an owner in fee demised a piece of land for a term of years to B., who assigned the term by way of mortgage to the lessor, and afterwards built four houses on the land. The lessor then made his will, and thereby devised his four freehold houses specifically on one set of trusts, and bequeathed his personal estate on another set; at his death he was in possession as mortgagee; and it was held that the mortgage *debt was a distinct subject from the reversion, and did not pass by the devise, but by the bequest of personal estate: that the debt was charged on the term, that the term was merged at law, and that the testator had entered into possession, were immaterial facts, the equity of redemption remaining unbarred.]

And here it may be observed, that a devise by a testator to his wife of an estate which he had "lately contracted to sell to A" has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money. (p)

Devise of land contracted to be sold, held not to pass benefit of the contract.

Upon the whole, it is clear that the proposition which states that an express devise of mortgaged lands will carry the beneficial interest in the mortgage, must be received with some qualification.

That the benefit of a mortgage will pass by the word "mortgages," collocated with other personal chattels, is perfectly clear. (q)

Passes by word "mortgages."

In conclusion of this branch of the subject, it may be observed, that where a person having a mortgage or other charge upon lands becomes himself entitled to the *inheritance* of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him. (r) But if a purpose beneficial to the owner can be answered by

Charge when extinguished by union of character of mortgagor and mortgagee.

[(o) L. R., 11 Eq. 454, 8 Ch. 171.]

(p) *Knollys v. Shepherd*, cited 1 J. & W. 499, *ante* p. *56.

(q) *Att.-Gen. v. Bowyer*, 3 Ves. 714; *Dicks v. Lambert*, 4 Ves. 730.

(r) *Price v. Gibson*, 2 Ed. 115; *Donis-*

thorpe v. Porter, Id. 162, Amb. 600; *Lord Compton v. Oxenden*, 2 Ves., Jr., 261;

[*Johnson v. Webster*, 4 D., M. & G. 474.

The union of interest must happen in the lifetime of the party, and no other person must at that time have any interest in the

keeping the charge on foot, as if he be an infant, so that the charge would (under the old law allowing infants to bequeath personal estate) be disposable by him, though the land would not, (s) or a beneficial use might have been made of it against a sub*sequent encumbrancer, (t) or the other creditors of the person from whom the party derived the onerated estate ; (u) in these and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law. (x) And the same rule obtains in favor of the creditors of the person in whom these interests centre. (y) So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist. (z)

II.—We now proceed to consider the operation of a general devise

Operation of a
general devise
on legal es-
tate.

on real estate vested in the testator as mortgagee or trustee. The rule at length established, after much fluctuation of authority, is, that such property *will* pass under a general devise of lands, unless a contrary intention can be collected from the testator's expressions, or from the purposes or limitations to which he has devoted the subject of disposition.² And it is clear that the cir-

charge, *Tucker v. Loveridge*, 1 Gif. 377, 2 De G. & J. 650; *Wilkes v. Collin*, L. R., 8 Eq. 338. General powers to appoint the land and the charge, which (in default) are respectively limited to the heirs and next of kin of the donee, do not produce the required union, *Clifford v. Clifford*, 9 Hare 675.]

(s) *Thomas v. Kemish*, 2 Vern. 348, 1 Eq. Cas. Ab. 269, pl. 9.

(t) *Gwillim v. Holland*, July 29th, 1741, cit. 2 Ves., Jr., 263.

(u) *Forbes v. Moffatt*, 18 Ves. 384; [Lord Clarendon *v. Barham*, 1 Y. & C. C. 688; *Davis v. Barrett*, 14 Beav. 542; see *Wigsell v. Wigsell*, 2 S. & St. 364. The relative values of the estate and such other charges will not generally be inquired into; but *semb.* the charges must be substantial, per Wood, V. C., *Richards v. Richards*, Johns. 767.]

(x) See Sir W. Grant's judgment in *Forbes v. Moffatt*. [Those cases, where the charge and the inheritance become united by descent or devise, are to be dis-

tinguished from *Greswold v. Marsham*, 2 Ch. Cas. 170; *Mocatta v. Murgatroyd*, 1 P. W. 393; *Toulmin v. Steere*, 3 Mer. 210, as to which, see 1 Ll. & Go. 251, 1 D., M. & G. 244.]

(y) *Powell v. Morgan*, cit. 2 Vern. 208. See also Lord Northington's judgment in *Donisthorpe v. Porter*, 2 Ed. 162; [*Pears v. Weightman*, 2 Jur. (N. S.) 586.]

(z) *Wyndham v. Earl of Egremont*, Amb. 753. As to the evidence required to rebut the presumption of extinguishment, see *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244, and cases there cited.

2. See Lewin on Trusts (2d Am. ed.) 262; Hill on Trustees (3d Am. ed.) 283; Perry on Trusts, §§ 335-339; Hawkins on Wills 35; Theobald on Wills 75; Tiffany on Trusts 825, *et seq.*; Wms. Ex'rs (6th Am. ed.) 1288, note (h); and, as to mortgage interests, *Taylor v. Benham*, 5 How. 270; *Drane v. Gunter*, 19 Ala. 731; *Ballard v. Carter*, 5 Pick. 112; *Van Wagenen v. Brown*, 2 Dutch. 196; *Jackson v. Delancey*, 13 Johns. 537, affirming 11 Johns.

cumstance of there being other property to which the devise is applicable, is no ground of exclusion.

Thus, in an early case, (a) it is laid down, that if a man had but the trust of a mortgage of lands in D. and had other lands in D., by a devise of all his lands in D. the trust would pass.

Legal estate
held to pass.

In *Ex parte Sergison*, (b) a mortgagee in fee devised all the rest, residue and remainder of his estate, both real and personal, and of what nature or kind soever and wheresoever, not thereinbefore specifically given, devised and bequeathed, to A, his heirs, executors, administrators and assigns, forever, on the side of his mother, and appointed A executor. A was an infant. On petition for an order for him to convey under stat. 7 Anne, c. 19, Sir R. P. Arden, M. R., was of opinion that the legal estate in the mortgaged lands passed by the devise, though, as the infant was executor, and therefore entitled to the money, *he could not compel him to convey. Lord Loughborough also inclined to think that the estate passed by the devise; and it was stated at the bar that this corresponded with the opinion of Lord Northington and Lord Thurlow, who had overruled Lord Hardwicke's *dictum* in *Casborne v. Scarfe*. (c) In the principal case, however, *the heir*, under the circumstances, was ordered

Ex parte
Sergison.

Opinions of
Lord North-
ington, Lord
Thurlow, and
Sir R. P.
Arden.

365; 2 Washb. R. P. 133. But see, *contra*, *Breckinridge v. Waters*, 4 Dana 620. And a devise sufficient to pass a mortgagee's estate would not, prior to the recent enabling acts, pass the equity of redemption acquired by foreclosure after execution of the will, *Van Wagenen v. Brown*, 2 Dutch. 196; *Ballard v. Carter*, *ubi supra*; *Brigham v. Winchester*, 1 Metc. 390. In *Woods v. Moore*, 4 Sandf. 579, a devise of land sold by the testator before executing his will was held to pass the bond and mortgage taken by him for the purchase money. So, too, *Gibbes v. Holmes*, 10 Rich. Eq. 484. As to trust estates passing under a general devise, see *Jackson v. Delancey*, *ubi supra*; *Heath v. Knapp*, 4 Penna. St. 228; 2 Washb. R. P. 477; *Richardson v. Woodbury*, 43 Me. 206; *Abbott's Petition*, 55 Me. 580; *Hughes v. Caldwell*, 11 Leigh 342. But where the

devisee is a minor or one to whom the trust estate cannot pass without a breach of the trust, an intention not to pass such estate will be presumed, and the estate will not pass, *Merrit v. Farmers' Ins. Co.*, 2 Edw. 547; *Den d. Wills v. Cooper*, 1 Dutch. 137. See also, *Cogdell v. Cogdell*, 3 Desaus. 346. But the testator cannot confer upon his executors the power to execute the trust, *Hughes v. Caldwell*, 11 Leigh 342, 349.

(a) *Littleton's Case*, 2 Vent. 351. See also *Marlow v. Smith*, 2 P. W. 198.

(b) 4 Ves. 147.

(c) 1 Atk. 605. But it has been suggested that his lordship may have referred to the beneficial interest (see *Mr. Sanders' note*); and, perhaps, in regard even to the legal estate, the position is not erroneous, as a devise, in the terms supposed, would confer only a life estate; and it has

to convey; the L. C. observing, that the infant devisee, when he was of age, might join, which would give a title *quacunqve via*.

In *Att.-Gen. v. Buller*, (*d*) lands of which the testator was trustee were held *not* to pass under a devise whereby the testator, after devising for the payment of his debts and other moneys, his lands and hereditaments in very general terms, unto his sons J. B. and F. B. and their heirs, forever, added, "And all the rest and residue of my goods, chattels, rights, credits, *and all my real and personal estate not hereby before given* devised and bequeathed, and all my right, property and interest therein, by law or equity, I do give devise and bequeath unto my sons J. B. and F. B.," (*e*) whom also he appointed executors. Lord Loughborough assented to the statement at the bar, that the rule was that general words would *not* pass trust estates, unless there appeared to be an intention that they should pass: in allusion to which Lord Eldon, in *Lord Braybrooke v. Inskip*, (*f*) observed that he did not know, in his experience, of any case in which the proposition was laid down so strong one way or the other. The language of Lord Thurlow, in *Pickering v. Vowles*, (*g*) notwithstanding what is said in *Ex parte Sergison* of his opinion, certainly seemed to favor the same doctrine.

In *Ex parte Brettell*, (*h*) too, Lord Eldon was of opinion, that an estate of which the testator was mortgagee in fee in trust for another person, did not pass under a devise of all the rest of his estate and effects whatsoever and wheresoever, and of what **nature or kind soever*, unto G. H., his heirs, executors, administrators and assigns, forever, to and for his and their own proper use and behoof.

Of this case, however, it is sufficient to observe, that the very

never been held that a general devise conferring less than a fee would operate to pass estates vested in the testator as mortgagee or trustee. Such a question, of course, is less likely to arise now that under *an* will made or republished since 1837, an unrestricted devise will carry the fee. [In *Greenwood v. Wakeford*, 1 Beav. 576, it was held that the legal estate of lands vested in a surviving trustee during the life of a married woman, passed by a devise of "all the lands and heredita-

ments vested in him as trustee or mortgagee in fee," the question apparently being whether the words, "in fee" referred as well to "trustee" as to "mortgagee."]

(*d*) 5 Ves. 340.

(*e*) The direction to pay debts, &c., it will be observed, does not extend to the latter devise.

(*f*) 8 Ves. 435, stated *infra*.

(*g*) 1 B. C. C. 197.

(*h*) 6 Ves. 577.

learned judge by whom it was decided warrants us in regarding it as no authority on the general question, his lordship having, on a subsequent occasion, (i) remarked that “ it came on on petition, *and perhaps was not so attentively considered as the importance of the point required.*”

The preceding cases had left the subject in some degree of doubt. But the present doctrine was finally established by Lord Braybroke v. Inskip, (k) where real estate having been devised to trustees, upon trust to pay debts, and settle the estates to certain uses ; the question was, whether the estate passed by the will of the heir of the surviving trustee, who gave and devised *all his real estates whatsoever and wheresoever, unto his wife G., her heirs and assigns, forever*, and gave all his personal estate to her ; and appointed his said wife and B. executrix and executor. The heirs-at-law were two infants and a married woman. Lord Eldon held that the legal estate passed by the will. After reviewing the cases, he stated the rule to be, that *trust estates would pass under a general devise, unless it could be collected, from expressions in the will, or purposes or objects of the testator, that he did not mean that they should pass.* In this case he observed there was no one circumstance to cut down the effect of the devise.

Rule finally established in Lord Braybroke v. Inskip.

Trust estates will pass under a general devise containing nothing inconsistent.

It seems that Lord Loughborough, notwithstanding the opinion expressed by him in *Att.-Gen. v. Buller*, concurred in the rule laid down in the last case. (l)

It should be noticed that Lord Eldon, in the course of his judgment in *Lord Braybroke v. Inskip*, frequently adverts to, and even lays some stress upon the circumstance of the heirs-at-law being under a disability to convey, and the consequent inconvenience of permitting the legal estate to descend to them ; and more than once observes, that the *quantum* of convenience is to be estimated on each will. This ingredient, it is submitted, would render the rule most difficult of general application. If the “ weighing of inconveniences ” were to be made on every particular will, (the relative situation of the heir and devisee being thrown into the scale,) it would be impossible in any case to ascertain the effect of such a general devise without evidence of these facts, and *where such evidence was inaccessible, (as it inevitably must be in regard to wills occurring in the early period of a title,) the operation of the devise must always

Lord Braybroke v. Inskip.

(i) 8 Ves. 434.

(l) Id. 437.

(k) Id. 417.

be uncertain; and, moreover, the facts, when discovered, might present such an apparent balance of inconveniences, as to render it difficult to say on which side they preponderated. Besides, if the inquiry as to the relative situation of the devisee and heir refer, as it necessarily must, to the period of the *making* of the will, it is obvious that such an alteration may have taken place in that situation, between the period in question and the death of the testator, as would render the application of such a test not only not beneficial, but actually mischievous, even in the particular cases for the sake of which the general inconvenience attendant on a fluctuating and uncertain rule is to be incurred. But such a principle of construction, it is conceived, is inconsistent with authority, no less than with general convenience; since all the cases which state the rule to be that trust estates will pass under a general devise, unless the purposes be inconsistent, decisively negative the introduction of any additional circumstances into the subject of consideration. To engraft such a qualification is to change the rule. It is at variance, also, with the principle on which Lord Eldon, in one instance, (*m*) disclaimed making the coverture and infancy of devisees a ground for holding that they took beneficially, and not as trustees. In fine, his observations in *Braybroke v. Inskip* seem to be merely thrown in to give additional weight to a judgment which, independently of any such reasoning, stands upon irrefragable grounds, and has (we shall see) governed the subsequent decisions upon this subject.

Thus, in *Bainbridge v. Lord Ashburton*, (*n*) where the surviving trustee under a will, after devising certain specific real estates to various persons, gave and devised all his real estates, not thereinbefore otherwise disposed of, unto his godson, his heirs, executors, administrators and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit. It was held that the trust estate passed under the devise: Alderson, B., remarked (in reference to Lord Eldon's reasoning in *Ex parte Brettell*) that it would be a very minute distinction to draw any line between the words "benefit" and "behoof."

*It is clear that the fact of the testator having reserved to the devisee a power of appointment does not constitute a ground for excluding trust estates. Thus, in *Ex parte*

Bainbridge v. Lord Ashburton.
Reservation of power of appointment.

(*m*) *King v. Denison*, 1 Ves. & B. 275, *sup.* pp. *571, *572.

(*n*) 2 Y. & C. 347; [and see *Sharpe v. Sharpe*, 17 L. J., Ch. 384, 12 Jur. 598; *Langford v. Auger*, 4 Hare 313.]

Shaw, (o) where the devise was in the following words: "I give, devise and bequeath unto my dear wife Ann, to hold to her my said wife, her heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, for all my estate and interest therein, to and for her own absolute use and benefit, *and to be disposed of by her, by deed, will or otherwise, as she my said wife may think fit*;" and the testator appointed his wife sole executrix; Sir L. Shadwell, V. C., held that an estate vested in the testator as trustee passed by this devise.

The converse of the rule established by the preceding cases is equally clear; namely, that if the property comprised in the general devise be subjected to the payment of debts, legacies, annuities, or any other species of charge, (p) or the will contain any limitations or provisions to which it cannot be supposed that the testator intended to subject property not beneficially his own, as uses in strict settlement, (q) or executory limitations; (r) or a trust for sale, (s) [or for a charity, (t) or for the separate use of a married woman, (u), or for an unascertained class; (v) or words of severance making the devisees tenants in common, with a clause of accruer amongst them, (x)] the mortgage or trust lands will *not* pass. [And considering the inconvenience

What will exclude trust estates from a general devise.

Charges of debts, executory limitations, &c., will exclude trust estates.

(o) 8 Sim. 159; [but *qu.* was any power created?]

(p) *Wynne v. Littleton*, 2 Ch. Rep. 51, 1 Vern. 3, (but as to this see 1 Cov. Pow. Mortg. 414); *Roe d. Reade v. Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; [*Rackham v. Siddall*, 16 Sim. 297, 1 Mac. & G. 607; *Hope v. Liddell*, 21 Beav. 183; *In re Bellis' Trusts*, 5 Ch. D. 504. The foregoing are cases of trust estates. The following are cases of mortgage], *Duke of Leeds v. Munday*, 3 Ves. 348; *In re Horsfall, M'Clel. & Y.* 292; [*Doe d. Roy-lance v. Lightfoot*, 8 M. & Wels. 553; *In re Packman and Moss*, 1 Ch. D. 214. As to *In re Stevens' Will*, L. R., 6 Eq. 597, *vide post* p. *701.]

(q) *Thompson v. Grant*, 4 Mad. 438; *Att.-Gen. v. Vigor*, 8 Ves. 276; overruling *Ex parte Bowes*, cited 1 Atk. 605, n., by *Sanders*, where Lord Hardwicke held that a general devise of real estate in S.

K. and M. and elsewhere in England to certain uses, under which an infant was then entitled to an estate tail, passed the legal estate in lands of which the devisor was mortgagee in fee; [but see *Burdus v. Dixon*, 4 Jur. (N. S.) 967, where the testator had attempted to make the mortgaged property his own, by a pretended sale to another, who was a trustee for the testator, and the legal estate was held to pass notwithstanding the uses and trusts.

(r) *Per Lord Eldon, Braybrooke v. Inskip*, 8 Ves. 434.]

(s) *In re Marshall*, 9 Sim. 555.

[(t) *Att.-Gen. v. Vigor*, 8 Ves. 276.

(u) *Lindsell v. Thacker*, 12 Sim. 178. See, however, per *Kindersley, V. C., Lewis v. Mathews*, L. R., 2 Eq. 181.

(v) *In re Finney's Estate*, 3 Gif. 465.

(x) *Thirtle v. Vaughan*, 2 W. R. 632, 24 L. T. 5; *Martin v. Laverton*, L. R., 9 Eq. 563.

arising from the devolution of a trust estate in shares *it would seem that the words of severance alone are sufficient to exclude it from a general devise. (y)]

And it is wholly immaterial whether the testator has other lands to which the devise can be applied or not; for in these cases the courts have not adopted the principle applicable to reversions, that, where there are other lands, to which the inconsistent limitations can be referred, they apply exclusively to those lands, *reddendo singula singulis*. (z)

In *Ex parte Morgan*, (a) Lord Eldon held, that lands of which the testator had merely the legal estate, as heir-at-law of the preceding mortgagee, did *not* pass under a devise to trustees of "all such real estates as are now vested in me by way of mortgage, the better to enable them my said trustees, and the survivor of them, and the executors and administrators of such survivor, to recover, get in and receive the principal moneys and interest, which may be due thereon."

The rule under consideration, of course, does not deny the power of a testator to limit estates vested in him as mortgagee or trustee to uses in strict settlement or in any other manner equally inconsistent with a due regard to the testator's duty as mortgage creditor or trustee: it merely refuses to see an intention so to do in a general devise. Should a testator unequivocally devise an estate vested in him as mortgagee or trustee in the manner suggested, the intention must prevail; and it would be left to the persons who may become damnified by such a proceeding to obtain satisfaction out of the estate of the deceased testator. (b)

(y) *Martin v. Laverton*, L. R., 9 Eq. 568, per Malins, V. C. *Ex parte Whiteacre*, 1 Sand. Uses 359, n., is sometimes cited *contra*, but the devise contained the words "mortgages and securities," as to which *vide infra*.

(z) 5 Ch. D. 508, notwithstanding 3 Ch. D. 156.]

(a) 10 Ves. 101. [And see *In re Smith's Estate*, 4 Ch. D. 70; *In re Morley's Will*, 10 Hare 293.

(b) If, after a contract for sale, but before completion, the vendor dies leaving an infant heir, or having by will, executed before the date of the contract, devised

the estate to a person incompetent to convey, the vendor's estate will not have to bear the costs of the suit rendered necessary to complete the conveyance, *Hanson v. Lake*, 2 Y. & C. C. C. 328; *Hinder v. Streeton*, 10 Hare 18, 16 Jur. 650; *In re Manchester and Southport Railway Company*, 19 Beav. 365; *Bannerman v. Clarke*, 3 Drew. 632; overruling *Prytharch v. Havard*, 6 Sim. 9; *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57; *Eastern Counties Railway Company v. Tuffnell*, 3 Rail. Cas. 133. But if *after* contract to sell the vendor execute such a will, the costs of suit will be thrown on

Whether lands held by a testator as mortgagee will pass by the words "mortgages" or "securities for money" has been the *subject of much controversy. The affirmative was supposed to have been decided in the early case of *Cryps v. Grysil*; (c) and although on an examination of the record, (d) it appeared that the will contained, in addition to the word "mortgages," other expressions more unequivocally applying to the land, [yet the *ratio decidendi* was that the word "mortgages" made a good devise of the lands. And it is now settled] that the words "mortgages," "securities for money," and similar expressions, will comprise the entire benefit of the mortgage security (including the inheritance in the lands,) (e) unless a contrary intention appears by the context; [and that the fact of those words being found among terms descriptive exclusively of personal estate (f) and followed by a limitation to executors and administrators only, and not to heirs, or by a charge of debts and legacies, (g) or a trust for sale, (h) or for several as tenants in common, (i) will not affect the construction. The broad principle is, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money by giving him the legal estate in the mortgaged lands. (j)]

But further, in *Doe d. Guest v. Bennett*, (k) where a testator made his will as follows: "I leave my wife to receive all moneys upon mortgages and on notes out at interest, and at her decease I leave my niece to pay my wife's debts and to

Words "mortgages" and "securities for money" pass the legal estate.

Devise "that A shall receive money on mortgage," or "on securities."

his estate, *Worham v. Lord Dacre*, 2 K. & J. 437; *Purser v. Darby*, 4 Id. 41.]

(c) *Cro. Car.* 37.

(d) See 9 B. & Cr. 282.

(e) Before as well as since the statute 1 Vict., c. 26, see *Renvoize v. Cooper*, 6 Mad. 371; *Silberschildt v. Schiott*, 3 Ves. & B. 49, per Sir W. Grant; *In re Walker's Estate*, 21 L. J., Ch. 674; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 C. B. (N. S.) 308; but the old case of *Wilkinson v. Merryland*, *Cro. Car.* 449, is *contra*.

(f) *Renvoize v. Cooper*, 6 Mad. 371; *In re King's Mortgage*, 5 De G. & S. 644.

(g) *In re Field*, 9 Hare 414; *In re King's Mortgage*, 5 De G. & S. 644; *Rip-*

pen v. Priest, 13 C. B. (N. S.) 308; *Knight v. Robinson*, 2 K. & J. 503.

(h) *Ex parte Barber*, 5 Sim. 451.

(i) *Ex parte Whiteacre*, *Rolls*, 22d July, 1807, 1 Sand. Uses and Trusts, 359, n.

(j) The special grounds relied on in *Ex parte Barber*, 5 Sim. 451, and *Mather v. Thomas*, 6 Sim. 115, were therefore not essential. *Sylvester v. Jarman*, 10 Pri. 78, and *Galliers v. Moss*, 9 B. & Cr. 267, are overruled: so is *Ex parte Gorfett*, 19 L. J., Ch. 173, 14 Jur. 53, unless it can be distinguished on the ground that the security was in the form of a trust for sale, *sed qu*.

(k) 6 Exch. 892.

take all that remains of my property, land or personal property ;" the Court of Exchequer held that the wife took the legal estate in the mortgaged property. Parke, B., said, "The words 'to receive all moneys upon mortgage,' in my opinion, pass the security, that is, the legal estate on which the money was secured. It must be assumed that the testator intended the wife to receive the money and to possess all the powers necessary for the purpose of re*covering it ; and therefore she is entitled to bring ejectment for that purpose." Alderson, B., was of the same opinion, adverting also to the devise to the niece of all that remained of the property, land or personal property, as implying that the wife was to have the whole of that which was devised to the niece in remainder.

And in *In re Arrowsmith's Trusts*, (l) a mortgagee in fee devised to a trustee all his real and personal estate in trust, after payment of his debts and funeral expenses, to permit his wife to receive the rents of his real estate and the interest of all sums due on mortgage bond, note or other security, for her life, and at her death *to get in* all debts owing to him on any security and to pay a legacy to his son A ; and on the death of the wife, the testator gave a certain house and the residue of his real and personal estate to his son B ; it was held by K. Bruce and Turner, L. JJ., that the legal estate in the mortgaged property passed to the trustee, that construction being necessary to give full dominion over the mortgaged estate for the purpose of carrying into execution the trusts of the will. K. Bruce, L. J., said, "I take occasion to express my entire concurrence in the judgment of Parke, B., in *Doe v. Bennett*."

Sir R. Kindersley, however, held that the legal estate did not pass by a gift of "money in the funds and on securities." He thought *Doe v. Bennett* was distinguishable ; but if it was meant that a legatee who was to receive the money was also to take the legal estate, he could not concur. (m) If that principle were to be carried out it would apply to a case where a testator merely left his personal estate to his executors, it being obviously his int^egion in that case that they should receive the mortgage money. (n) But hitherto the principle has been confined to cases where the intention has been expressed.

(l) 27 L. J., Ch. 704, 4 Jur. (N. S.) *schildt v. Schiott*, 3 Ves. & B. 49.
1123.

(n) *In re Cantley* (or *Cautley*), 17 Jur.

(m) But see per Grant, M. R., *Silber* 124, 22 L. J., Ch. 391.

As already stated, a general devise of real estate on trust for sale will not include the legal estate in mortgaged property. (o) But where the real and personal estates are devised and bequeathed together, expressly in trust to sell and get in, the trustees cannot execute these trusts as regards the personalty without having dominion over the mortgaged estate; and, though it has never been so held, there is a strong inclination to say that the express trust to sell and get in the *personalty* neutralizes the *restrictive effect which the trust for sale would otherwise have upon the devise of real estate, and to hold that thus the latter devise carries the mortgaged estate. (p)

Gift of real and personal estates, in trust to sell and get in.

But a gift of the real and personal estate charged (as in *In re Arrowsmith's Trusts*) with debts, or charged with debts and legacies, but not aided by express mention of "mortgages," or "securities," nor by express trust to sell and get in the personalty, will not include the mortgaged estate. Thus, in *Doe d. Roylance v. Lightfoot*, (q) where a mortgagee devised all his real and personal estates after payment of his debts and legacies to A and B as tenants in common in fee; it was held, that the legal estate did not pass by the will, on the ground that the testator could not have intended that estates should pass of which he was seized only as mortgagee, but only those which he had power to subject to his debts and legacies, namely, those which were equitably as well as legally his own.

Gift of real and personal estate subject to debts.

A decision which at first sight seems opposed to this was made in *In re Stevens' Will*, (r) where a mortgagee in fee directed all her debts to be paid: she then gave several pecuniary legacies, and as to all the rest and residue of her real and personal estate and effects, she gave the same to J. for her own absolute use and benefit; and appointed other persons executors. The course which the case took deserves notice. On one side it was argued that the charge of debts and legacies affected the testator's own estates and

In re Stevens' Will.

(o) *Ante* p. *697.

(p) See per Jessel, M. R., *Lysaght v. Edwards*, 2 Ch. D. 515, and *In re Smith's Estate*, 4 Ch. D. 72, ("whatever might have been the case if the mortgage money had belonged to the testator in his own right"); and per Shadwell, V. C., *Ex*

parte Barber, 5 Sim. 455, where, however, the word "securities" occurred.

(q) 8 M. & W. 553. The statement of the devise is taken *verbatim* from the report. The tenancy in common was not adverted to.

(r) L. R., 6 Eq. 597.

no others, (s) and therefore did not prevent the legal estate in the mortgaged property passing to J. On the other side this *was not disputed*, so far as concerned the charge of debts; but it was contended that the charge of legacies, being in a different form, (t) was enough to prevent the legal estate passing; and for this *Doe v. Lightfoot* was cited. But Sir G. Giffard, V. C., fastening on the admission respecting the charge of debts, decided that the legal estate passed to J. He said, "The charge of legacies is the point insisted on as being a reason why the legal estate should not pass. I quite agree that in this will there is enough to charge both the debts and legacies *on the testatrix's own real estate, but *if* the charge of debts would not prevent the legal estate in the mortgaged property passing, so neither would the charge of legacies. The modern authorities have extended the cases in which the legal estate in a mortgage has been held to pass. Here, subject to the charge of debts and legacies, there is an absolute gift to J. I am not precluded by authority from holding that the legal estate passed in this case; and I do not hesitate to say that *in a case such as this* good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident and a useful and necessary incident to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that the legal estate in a mortgage should pass. I am of opinion that on this will there was an intention that the legal estate in a mortgage should pass, and there is nothing to rebut this intention." The V. C. recognized no distinction between one form of charge and another: so that, it being admitted that the charge of debts did not prevent the legal estate passing, it followed that the charge of legacies had not that effect. *In a case such as that*, *Doe v. Lightfoot* did not preclude him from holding that the legal estate passed. The decision depends on the word "if."

Since *In re Stevens' Will* the authority of *Doe v. Lightfoot* has been fully recognized; (u) and in *In re Packman and Moss*, (x) where a mortgagee gave and bequeathed all his property, real and personal, to trustees (whom he appointed executors) upon trust, first, to pay debts, and as to the residue on certain trusts for his wife and children, Sir G. Jessel decided that the legal estate did not pass, on this,

(s) The contrary is settled, *ante* p. *698. Trusts, 5 Ch. D. 509.

(t) *Ex rel.*

(x) 1 Ch. D. 214. See also *In re Hors-*

(u) By Jessel, M. R., *In re Bellis'* fall, M'Cl. & Y. 292.]

among other grounds, that the testator's debts could only be paid out of his own property.]

Hitherto the point of construction under consideration has been viewed in reference to mortgages *in fee*. With respect to mortgages for terms of years, it is conceived they fall under the principle established by *Rose v. Bartlett*, (y) that leaseholds for years will not, under the old law, pass by a general devise of lands, unless the testator have no freeholds on which it might operate. If there be no such lands, or the will be subject to the new law, and if the devise contain nothing inconsistent, and there be no specific bequest which will carry the legal interest in the *mortgage term, it is clear that such interest will pass under a general devise. The question, however, could hardly arise on the mere legal interest, since it would vest primarily in the executor, or the administrator *cum testamento annexo*, as part of the testator's personal estate, and it is unlikely that the legatee would claim his assent to the bequest, unless there was ground to contend, that the bequest included the beneficial interest.

Mortgage terms, when included in a general devise.

Estates of copyhold tenure, held by the testator in the character of mortgagee or trustee, are not distinguishable from freeholds, in regard to the effect of a general devise, whether the will is subject to the old or new law; supposing, of course, that its antiquity is not such as to exclude it from the operation of the act of 55 George III., c. 192, which first dispensed with the necessity of a surrender to the use of the will, in regard to testators dying after the passing of the act.

Rule as to copyholds.

It has been sometimes a question, how far the principle which governs the construction of devises of lands, vested in a testator as mortgagee or trustee, applies to property which, belonging to him beneficially, he has contracted to sell. In such cases [it is argued], the testator is, in the event of the contract being carried into effect, a trustee for the purchaser: but as this may not happen, and consequently the property may remain unconverted, the trust is of a qualified and contingent nature. It has been decided, (z) however, that if a testator, *after* having contracted for the sale of an estate, devises it as, All that his estate called A, which he had contracted to sell, the effect is to vest in the devisee the legal

As to devises of lands contracted to be sold by testator.

(y) See *ante* p. *668.

(z) *Knollys v. Shepherd*, cited 1 J. & W. 499, [Sug. Law of Prop. 223.]

estate only, for the purpose of enabling him to carry the contract into effect for the benefit of the executor, *and does not entitle the devisee to the purchase-money*. It is conceived, however, (though the point did not arise in the case referred to,) that if from any circumstances the contract had proved not to be binding on, or had been rescinded by the testator, the devisee would have been entitled to the land, and this (as already hinted) constitutes a difference between the case, and that of a dry mortgage and trust estate, which renders the construction that has been applied to the latter, to a certain extent, inapplicable to the former. Thus, in *Wall v. Bright*, (a) where a testator, after having contracted for the sale of an estate, devised all his freehold and other his real and leasehold hereditaments and all his personal estate to trustees, upon trust to *sell and dispose of his said hereditaments and personal estate, with the usual powers to give discharges to purchasers, and to invest the purchase-money and hold the funds on certain trusts, Sir T. Plumer, M. R., held, that the contracted-for property passed by the devise: "Though there is a great analogy," he said, "in the reasoning with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate; yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as his own. In that respect he does not resemble one who has agreed to sell an estate, that, up to the time of the contract, was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was, at one time, both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract: and, in the interim between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not,

Difference between a vendor and a mere trustee.

(a) 1 J. & W. 494.

therefore, pursue the analogy between them too far." * * * "The safest way is to hold that the estate passes, adhering to the words, there not being enough to take it out of them."

In this case, the construction adopted by the court was very convenient, as it enabled the devisees, in performance of the testator's contract, to convey the estate to the purchaser, which otherwise would have descended to an infant, who, in the then state of the law, could not, even with the aid of the Court of Chancery, have made an effectual conveyance to the purchaser. Still, it is to be remembered, that a trust for sale was no less inappropriate to property which had been actually sold, than a devise in strict settlement, or any other such limitations would have been, though, as it confers on the trustees an estate in fee, it happened to be more convenient; and much of the reasoning of ^{Remarks upon Wall v. Bright.} ~~the~~ *M. R.* would have applied, if the devise had been such as to have rendered it impossible for the devisees, without the aid of the court, to make an effectual conveyance to the purchaser. He does, however, more than once advert to the convenience attending the construction in the particular case; and the prudent practitioner, knowing the influence which such considerations, whether acknowledged or not, do often exert in questions of this nature, will hesitate too readily to assume the application of the same doctrine to cases in which a different result would follow. Nor, indeed, does it seem to be altogether inconsistent with sound principles of construction, especially that rule which has been the subject of discussion in the present chapter, that the fact of the devise being such as to enable the devisee to carry the testator's contract into effect or not, should have some weight in determining whether it was intended to apply to the property. (b)

[But, as pointed out by Sir G. Jessel, (c) if the contract is a valid one, binding on both parties, and continues such at the time of the vendor's death, no subsequent event can affect the question; the property is converted, and the vendor is a constructive trustee; not a bare trustee, for he has a beneficial interest left in him, viz., a lien or charge on the estate for the security of the

If the contract is valid at the vendor's death, he is a trustee.

(b) But in such case the purchase-money would be payable not to the trustees by virtue of the devise, but to the executors as part of the personal estate of the testator, [*Eaton v. Sanxter*, 6 Sim. 517; so that this construction (as was observed

by Jessel, *M. R.*, 2 Ch. D. 520) could not be maintained where the proceeds of the real estate and the personal estate were given beneficially to different persons.

(c) 2 Ch. D. 507.

purchase-money, (d) but still a trustee. Therefore, where (e) a testator by his will, dated 1873, devised all his real estate to A and B on trust to sell, and devised the real estate which at his death might be vested in him as trustee to A, and afterwards *entered into a valid contract to sell part of his real estate, it was held by Sir G. Jessel, M. R., that this part passed by the devise of trust estates. He acquiesced in the decision in *Wall v. Bright*, because, viewing the testator as being entitled to the estate simply as a security for his purchase-money, he thought the trustees could not execute the trusts expressly annexed to the personal estate unless they had the legal estate; but he dissented from Sir T. Plumer's definition of the position of a vendor pending the completion of the contract. The sole question was, did a valid contract exist at the testator's death; if the title proved bad, he agreed there was no conversion and no trust; but that was because in contemplation of equity there was in that case no valid contract; (f) but whether the purchaser was able to pay or not was immaterial; if a contract valid at the vendor's death was canceled for non-payment of the purchase-money after his death, or for any other cause not affecting the original validity of the contract, the conversion was not therefore undone or the consequent trusteeship annulled.

But where the purchase has been completed by payment of the pur-

(d) In *Goold v. Teague*, 5 Jur. (N. S.) 116, it was held that such a lien did not pass by a bequest of securities for money. But the case is questioned, Sug. V. & P., p. 684.

(e) 2 Ch. D. 499. In *Purser v. Darby*, 4 K. & J. 41, the testator, after contracting to sell an estate, specifically devised it, so that, of course, it could not pass by a devise of his mortgage and trust estates contained in another part of the will. But it was said by Wood, V. C., that he had held—and the decision had been since affirmed—"that where there is merely a constructive and not an express trust, a devise of trust estates does not supersede the necessity of a decree." The decision referred to by the V. C. appears not to be reported. The meaning of the *dictum* is supposed by Jessel, M. R., to be only that

where a person under disability would take the estate if the contract were not established in a court of equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree, 2 Ch. D. 511. And generally a vesting order will not be made under the trustee acts without suit, *In re Carpenter*, Kay 418. But it is otherwise where the purchase-money has been paid, *In re Cumming*, L. R., 5 Ch. 72; *In re Crowe's Mortgage*, L. R., 13 Eq. 26; *In re Russell*, 12 Jur. (N. S.) 224. In the last case reliance was also placed on the sale being compulsory; *sed qu.*

(f) But assuming the purchaser to know this, he might very well be in doubt whether he had an enforceable title, and might therefore make his will with a dubious aspect.

chase-money and delivery of possession, though the deed of conveyance has not passed the legal estate, the vendor is in the position of a bare trustee, and there is no difficulty in holding that a general devise of lands by the vendor in a manner inconsistent with his duties as trustee (charged, for instance, with the payment of his debts) will not include the legal estate.] (g)

Distinction where purchase-money paid and possession given.

Where a mortgage in fee is foreclosed subsequently to the making of a will, it is clear that the equity of redemption so acquired will not pass by a will made before and not republished on or since the 1st of January, 1838; 3 and it has been determined, that the period of foreclosure is the date of the final order of the court, following default of payment on the day appointed, and not the date of the decree. (h) But though the equity of redemption *subsequently* acquired by foreclosure will not pass by the will, it is clear that the devise of the *legal estate* takes effect, notwithstanding the mere acquisition of the equity of redemption, by this or any other means. Where, however, such equity is purchased by the mortgagee, and he and the mortgagor in the usual manner join in conveying the property to a releasee *to uses to prevent dower, for the benefit of the former, the devise, being in a will which is subject to the old law, will be revoked. (i)

Effect on devise by mortgagee, of subsequent foreclosure.

In one instance (j) Sir W. Grant held, that an estate devised after foreclosure passed by a description applicable to it only as a mortgage; on the ground that the intention, though inaccurately expressed, appeared upon the whole will to give the interest in the land. And Sir L. Shadwell, V. C., came to the same conclusion, upon the same devise. (k) This was simply a question of intention, as the testator might of course, if he chose, continue to describe it as mortgaged property; and it would pass, unless an intention appeared that the devisee should be entitled only in case it retained its mortgage character. [But a mere general devise of "all estates whereof he is seized as mortgagee," by a testator, who afterwards purchases the equity of redemption, shows no such intention. The result here is ademption.] (l)

(g) *Dimes v. Grand Junction Canal Company*, 9 Q. B. 490, 3 H. L. Cas. 794.]

3. So, too, *Brigham v. Winchester*, 1 Metc. 390; *Ballard v. Carter*, 5 Pick. 112; *Van Wagenen v. Brown*, 2 Dutch. 196.

(h) *Thompson v. Grant*, 4 Mad. 438.

(i) *Ante* p. *155.

(j) *Silberschildt v. Schiott*, 3 Ves. & B.

45.

(k) *Le Gros v. Cockerell*, 5 Sim. 384.

[(l) *Yardley v. Holland*, L. R., 20 Eq.

428.]

It is obvious that the question, whether lands are comprised in a general devise, must frequently depend on the fact, whether the testator had or had not at the time acquired the equity of redemption by length of possession and non-recognition of any adverse title. *(m)* A question of this kind occurred on the will of Sir George Downing; *(n)* and it was held, that lands comprised in a certain old mortgage in fee, purchased by the testator, passed under a general devise; it being considered, that from the length of possession, under the circumstances, a release of the equity of redemption was to be presumed.

With respect to mortgages for years the question would be somewhat different; the point, if material at all, being, whether the equity of redemption was acquired, not at the date of the will but at the testator's decease; since they would pass under a bequest of property of that denomination to which they belonged at the latter period. Thus, suppose a will to contain a bequest of mortgages to A, and of leasehold generally to B, a mortgage for years, which was redeemable at the date of the will, and which would at that period have passed under the former bequest, having become, by continued possession *in the lifetime of the testator*, or by express contract, irredeemable, *would, by this change in the nature of the property, pass under the bequest of the leaseholds. Such, it may be collected, was the opinion of Lord Eldon, in *Att.-Gen. v. Vigor*; *(o)* and it seems necessarily to result from the acknowledged principle, that a general bequest of chattels of a particular species, carries all the chattels of that kind, which the testator is possessed of at the time of his decease. And the same principle, of course, would apply even to mortgages in fee, if the will containing the devise in question were made or republished on or since the 1st of January, 1838.

[By the vendor and purchaser act, 1874, it is enacted (§ 4) that the legal personal representative of a mortgagee of freeholds or of copyholds to which the mortgagee has been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an

(m) Now see statutes 3 and 4 Will. IV., c. 27, § 28, and 1 Vict., c. 28; 2 Hayes' Introd. (5th ed.) 275 and 282; [37 and 38 Vict., c. 57, § 7.] *Id.* 300; *Att.-Gen. v. Vigor*, 8 Ves. 256. [See also *Burdus v. Dixon*, 4 Jur. (N. S.) 967, *ante* p. *697, n.] *(o)* 8 Ves. 276.

(n) *Att.-Gen. v. Bowyer*, 3 Ves. 714, 5

assurance subject to redemption or an assurance upon trust; and by section 5 (as amended by the land transfer act, 1875, § 48,) upon the death of a bare trustee, intestate as to any corporeal or incorporeal hereditament of which he was seized in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

38 and 39 Vict.,
c. 87, § 48.

As regards a mortgagee, this act is confined to the single case of payment of the debt; it does not enable the legal personal representative to convey or surrender in case of a transfer. (p) The effect of the mortgagee's will on the legal estate will therefore still come frequently in question. As regards trust estates, the act applies only when a bare trustee dies intestate. His legal personal representative takes his estate, and not merely (like the representative of a mortgagee) power to convey it. If there is no representative, the estate descends in the meantime to the heir. (q) "Bare trustee" is not a term of art, but it has been decided to mean one who has no beneficial interest in the trust estate, and, therefore, to exclude a vendor before payment of the purchase-money. (r) It would also seem to exclude a trustee with active duties which have not been performed, and the performance of which has not been effectually dispensed with. (s)

Effect of the
acts;

—as to mort-
gagees;

—as to trustees.

Who is a
"bare" trust-
tee?

*III.—A devise of estates vested in the testator as trustee or mortgagee is [commonly] found in [modern] wills. The insertion of such devises evidently supposes that the trusteeship relating to the estate vested in the testator will commonly pass with that estate to the devisee; for the severance of the estate and the fiduciary duty could not be a proper act on the part of the trustee. (t) [But the reasons given for the supposition are not entirely satisfactory. They are, first, that there are many cases in which it would be highly inconvenient that the trust estate should be permitted to descend to the heir, as where he is infant, lunatic or bankrupt. Secondly, it is said that if the heir (or *hæres natus*) is trusted to per-

Whether trust-
eeship passes
to devisees of
trust estates.

[(p) In *re Brooks' Mortgage*, 46 L. J., 9 Ch. D. 585.
Ch. 865.

(q) *Christie v. Ovington*, 1 Ch. D. 279.

(r) *Morgan v. Swansea*, 9 Ch. D. 582.

(s) *Per Hall, V. C.*, 1 Ch. D. 281; but *Jessel, M. R.*, doubted whether a trustee without interest was not a bare trustee, although he had active duties to perform,

(t) It is also said that the rule in *Braybroke v. Inskip*, *ante* p. *695, supposes the same thing; and that if it is wrong for a trustee to devise his trust estate, the courts were wrong in reading a general devise, uncontrolled by the context, as including such an estate.

form the fiduciary duties, why should not the devisee (or *hæres factus*) (*u*) be equally trusted; both being equally unknown to the author of the trust, and the one being by no possibility the object of personal confidence any more than the other?

An argument of this nature was urged without success in the leading case of *Cole v. Wade*, (*x*) where a testator gave his real and personal estate to A and B, whom he appointed his executors, their executors, administrators and assigns, in trust for such of his relations as they should think proper; and declared that, resting perfectly satisfied with the honor and justice of his said trustees and executors, he wished everything relative to that disposition, as well who were his relations as in what proportions they should take, should be entirely in the discretion of the said trustees and executors, and the heirs, executors and administrators of the survivor of them; and for the better division of his estate he directed his trustees and executors, and the survivor of them, and the heirs, executors and administrators of such survivor, if they should think proper, to sell or mortgage the estates or such parts thereof as they in their discretion should think proper: and the testator further directed the said A and B, or the survivor of them, or the heirs, executors or administrators of such survivor, to convey and pay the whole to his relations in manner aforesaid within a stated time. The surviving trustee devised and bequeathed the real and personal estates of the first testator to C and D upon the existing *trusts. Sir W. Grant, M. R., held that C and D were not competent to exercise the discretionary power of selection and distribution given by the first will: that the power did not pass with the estate; and that it was only *quasi personæ designatæ* that it could go to the heir. He observed that it was said the words were to be understood in the same sense as in the limitation of an estate, and imported that the person taking the estate should also exercise the discretionary power: but the testator had not said so.

The question has generally arisen upon trusts or powers of sale which, though to some extent discretionary, (*y*) partake largely of a ministerial character.

Thus] in *Cooke v. Crawford*, (*z*) where a testator devised all his real

(*u*) But this term is unknown to the English law, *Hogan v. Jackson*, Cowp. 305. Ab. 194; *Fordyce v. Bridges*, 2 Phill. 497.

(*y*) See *Clarke v. The Panopticon*, 4 Drew. 29; *Lewin on Trusts*, ch. II., where

(*x*) 16 Ves. 27, affirmed 19 Ves. 424; *Fearn v. P. W.* 313, is cited *contra*.]

see also *Att.-Gen. v. Doyley*, 2 Eq. Cas.

(*z*) 13 Sim. 91.

and personal estates to A, B and C, upon trust that they, or the survivors or survivor of them, *or the heirs of such survivor*, should as soon as conveniently might be after his decease, but at their discretion, sell all the real estates; and he authorized the trustees and their heirs to enter into contracts, and make conveyances, and declared that the receipt or receipts of the said A, B and C, or of the survivors or survivor of them, *or the heirs, executors or administrators of such survivor*, should be good discharges to the purchasers. And the testator directed his said trustees, their heirs, executors or administrators, to stand possessed of the proceeds of the sale of the real estate, and the conversion of his personal estate, which he thereby directed, upon certain trusts. Two of the trustees declined the trusteeship, and the third (who was also the heir-at-law of the testator) accepted the trust, but died before the sale of the estates, having made his will, whereby he devised and bequeathed all estates vested in him as a trustee, unto D and E, their heirs, executors, administrators and assigns, upon the trusts affecting the same respectively, and appointed D and E executors of his will. D and E entered into a contract to sell part of the trust estate, when the question arose whether they, as devisees and executors of the surviving trustee, could make a title to the purchaser. Sir L. Shadwell, V. C., held that they could not, and that the devise of trust estates by the vendors' testator was an unauthorized act. ["It is plain," he said, "that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons to whom no authority was given *for that purpose by the testator; and there is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it." He observed, that the testator had not used the word "assigns" in the clause creating the trust for sale, and concluded by saying that he saw no difference between a conveyance by act *inter vivos* and a devise, and that his own decision in *Bradford v. Belfield*, (a) if acquiesced in, and if not, then the authority of *Townsend v. Wilson* (b) was binding on the point.]

Cooke v. Crawford.

Devisee of trust estate held unable to make a title to a purchaser.

This case contradicts previous opinions and practice, and goes to

(a) 2 Sim. 264, where it was held that a trust for sale vested in A and his heirs could not be executed by an assignee of the heir of A, *i. e.*, a person to whom the heir in his lifetime had conveyed the estate. [But Lord Langdale, M. R., drew

a distinction between such an assignment and a devise, *inf. p.* *715.]

(b) 1 B. & Ald. 608, 3 Mad. 261; this case decided that a power of sale reserved to three persons and their heirs was not well executed by two survivors.

establish a rule most inconvenient in its operation. [But its operation is narrowed by the distinction pointed out by the V. C., and since generally adopted, between cases where the testator has expressly empowered the "assigns" of the trustee to perform the trusts, and those

Titley v. Wolstenholme. where he has not. Thus in *Titley v. Wolstenholme*, (c) where real and personal estate was devised to A, B and C, their heirs, executors, administrators and assigns, upon certain trusts; Devisee held competent where trusts to be executed by the trustee and his assigns. and it was declared that the trusts should be performed by the said trustees, and the survivors and survivor of them, his or her heirs and assigns. The surviving trustee devised the trust estates: and upon the distinction furnished by the word "assigns," Lord Langdale, M. R., held, that the trust estates were well vested in the devisee *upon the trusts of the original will*, and therefore refused to appoint new trustees in their place.

In *Mortimer v. Ireland*, (d) a testator appointed A and B executors and trustees of his property (which appears to have been entirely personal); B survived A, and by will gave to C all the trust property, upon the trusts declared by the first testator, and appointed C and D his executors. Sir J. Wigram, V. C., and upon appeal, (e) Lord Cottenham, decided that the appointment of C as trustee was unauthorized, and, upon the application of the *cestuis que trustent*, ordered the appointment of new trustees. The L. C. said: "Whether the property is real or personal estate is no matter; for suppose a man appoints *a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. The case before the M. R. was quite different, for there the court proceeded on the intention manifested, that the trusts should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here, then, are two persons appointed trustees; both die; thus there is no trustee, and it is for the court to appoint new ones. The testator having given no indication, the court must refer it to the master."

In *Ockleston v. Heap*, (f) a testator appointed A and B executors and trustees, and gave all his real and personal estate to his said trustees, their heirs, executors, administrators and

[(c) 7 Beav. 425.

(d) 6 Hare 196.

(e) 11 Jur. 721, 16 L. J., Ch. 416.

(f) 1 De G. & S. 640.

assigns, upon trust to sell and dispose thereof at their discretion; and he declared that "the receipts of his trustees or their survivor should be sufficient," and declared the trusts of the proceeds. A renounced and disclaimed; and B by will devised all trust estates vested in him to C and D; and the *cestuis que trust* took proceedings for the appointment of new trustees on the ground that it was doubtful under *Cooke v. Crawford* whether the devisees of B could act in the trusts. Sir J. K. Bruce, V. C., said, "What I should have done if *Titley v. Wolstenholme* had come before me, I need not say, nor am I sure. I think that in the present case there must be a decree for the appointment of new trustees in the usual form."

No reasons for this opinion are reported. The devise being to the trustees, "their heirs and assigns" followed immediately by the words "upon trust to sell," seemed to authorize a sale by the same persons, including the assigns, as were named in the devise. The power of giving receipts, it is true, was confined to the trustees or the survivor; but although powers or trusts for sale, given to heirs, have not been extended to assigns by the mention of assigns in the receipt clause, (g) it has never been held that the principal trust or power is to be restricted by the accessory. The V. C.'s disparaging allusion to *Titley v. Wolstenholme* is neutralized by his own question respecting the word "assigns" in the case next stated, and is outweighed by the decision in *Hall v. May*, (h) where Sir W. P. Wood, V. C., decreed *specific performance against a purchaser from the devisee, the original trust containing the word "assigns."

In *Wilson v. Bennett*, (i) the devise was to A, B and C, their heirs, executors and administrators, upon certain trusts; and "the said trustees and the survivors or survivor of them, his heirs, executors or administrators," were empowered to sell. C survived his co-trustees, and devised the property to D and E, who contracted to sell: but Sir J. K. Bruce, V. C., held, that their title was too doubtful to force upon a purchaser, and asked whether there was any case deciding that "heirs" included "assigns." It was afterwards discovered that D was the heir-at-law of C, and the case was

Remark on
Ookleston v.
Heap.

Wilson v. Ben-
nett.

(g) *Townsend v. Wilson*, 1 B. & Ald. 608; *Hall v. Dewes*, Jac. 190; *Bradford v. Belfield*, 2 Sim. 264.

(h) 3 K. & J. 585. See also *Ashton v. Wood*, 3 Sm. & Gif. 436. In *Hall v. May*, there was a power to appoint new trustees, which the V. C. thought strengthened the

conclusion drawn from the word "assigns" that the devisee was competent to execute the trust for sale. On the word "assigns," see further, *Saloway v. Strawbridge*, 1 K. & J. 371, 7 D., M. & G. 594.

(i) 20 L. J., Ch. 379, 15 Jur. 912.

then brought before Sir J. Parker, V. C., who held that the title was still bad, on the ground that the testator intended the power or trust to be executed by the person who had the estate, whereas this had been devised away from D the heir, to D and E. He said *Cooke v. Crawford* stood upon the ground that a trust cannot be delegated to persons not contemplated in its original creation. (*k*) This was followed in *Macdonald v. Walker* (*l*) by Sir J. Romilly, M. R., who said however that the doctrine of *Cooke v. Crawford* was a most inconvenient one, and involved this consequence, that if since the wills act (*m*) the surviving trustee devised the trust estate to his heir, though he was the very person contemplated, and had the estate, yet he could not exercise the trust because he took the estate by devise and not by descent.

In *re Burt* (*n*), where leaseholds were bequeathed to A and B, *their executors and administrators*, upon trust to dispose of the rents and profits as directed by the will, and after the death of A the surviving trustee bequeathed all estates vested in him as trustee to M and N to hold upon the same trusts, and appointed his wife and M and N executors: it was held by Sir R. Kindersley, V. C., that neither M and N alone as trustees, nor M and N jointly with the wife executrix, could exercise the trusts. He said the testator had himself declared that his executors as such should not be trustees, and by the bequest had *taken away the legal estate* from those who ought otherwise to have been the trustees.

*With respect to this case it will be noticed that until assent the trust estate vested in the executors and executrix. Being, then, the persons contemplated by the founder of the trust, and having the estate duly vested in them, were they not competent to act as trustees? Could it rest with the surviving trustee to say that, although thus qualified, they should not act? However, executors could not generally be advised to answer these questions themselves, and to withhold their assent, without the direction of the court.

In *Stevens v. Austen*, (*o*) the will was a close counterpart of the will in *Cooke v. Crawford*, and the surviving trustee having devised the trust estate, the devisee contracted to sell it. In an action by the purchaser to recover his deposit, it was held in

(*k*) 5 De G. & S. 475.

(*l*) 14 Beav. 556.

(*m*) *Qu.* inheritance act? *ante* p. *75.

(*n*) 1 Drew. 319.

(*o*) 30 L. J., Q. B. 212, *dub.* Blackburn, J., who observed that all the cases in chancery had been attempts to force the title on a purchaser.

Q. B. that the court was bound by previous decisions, and that the word "assigns" being omitted from the original trust, the devisee could not make a good title.

The cases therefore support, but certainly do not extend, the doctrine of *Cooke v. Crawford*; and, though it was suggested in the last case that a court of error might take a different view, the lapse of time since the doctrine was first admitted would be a serious objection to reversing it now.

Result of the cases.

In modern wills, the trust is generally made exercisable by the assigns as well as by the heir of the trustee; a course which obviates the somewhat delicate question whether a devise by a trustee whose assigns are not so authorized is a breach of trust. In *Cooke v. Crawford*, Sir L. Shadwell said, "It is plain that when C, (who had become the sole trustee,) thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do. And here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend, for in so doing he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee to be borne by *the assets of the trustee. (p) I see no substantial distinction between a conveyance by act *inter vivos* and a devise; for the latter is nothing but a *post-mortem* conveyance; and if the one is unlawful, the other must be unlawful." But Lord Langdale thought otherwise. In his opinion there was a clear distinction between a trustee conveying away the trust estate and relieving himself of the trust of his own authority during his own life, and assigning it by way of devise, which took effect only when there must be a transmission of the estate to some one not personally trusted by the author of the trust, and when, but for the devise, it might vest in infants, married women, bankrupts or persons out of the jurisdiction. He could not see his way to the conclusion that, in the case contem-

Whether it be a breach of trust to devise trust estates where the devisees cannot exercise the trusts.

(p) *Qu.* whether this would set matters right, see *dictum* of Romilly, M. R., *Macdonald v. Walker*, cited *ante* p. *713.

plated, (q) a devise by the trustee was a breach of trust. (r) Sir J. Parker, V. C., propounded (s) a narrower and more difficult rule, viz. that the question in every case was whether the devise was in accordance with the title under which the trustee held; it might often be the duty of a man in such circumstances, having the legal estate, to take care that it did not vest in a lunatic, or in a person out of the jurisdiction, or in any other person who ought not to be a trustee, and for that purpose to devise it. The safest course for the trustee would be that taken in *Beasley v. Wilkinson*, (t) where the devise was of all trust estates "which he could devise without breach of trust."]

(q) *I. e.*, the case of a trust to be executed by A. "or his heirs."

(r) 7 Beav. 435.

(s) 5 De G. & S. 479.

(t) 13 Jur. 649; but the original trusts are not reported, except, shortly, that they were for sale.]

*CHAPTER XXII.

WHAT GENERAL WORDS CARRY REAL ESTATE.

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| <p>I. Words "Estate" and "Property," and other such Terms—where restrained by Association with more limited Expressions to Articles ejusdem generis.</p> <p>II. Where not restrained by such Association.</p> <p>III. Whether restrained by Collocation with Executorship.</p> | <p>IV. Whether restrained by the Nature of Limitations.</p> <p>V. General untechnical Words held to pass Lands.</p> <p>VI. Words descriptive of Personality only, held, by force of Context, to include Real Estate.</p> |
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I.—It is obvious that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive of personal estate, are sometimes restrained by that association to subjects of the same species, agreeably to the maxim *noscitur a sociis*; and accordingly we find many instances, especially among the early authorities, in which the word *estate*, and other such terms clearly capable, *viribus suis*, of comprehending real estate, (a) have been restrained by the context to personality.¹

Words "estate," "property," &c., capable of carrying real estate.

Restreined by association with personality in following cases.

(a) *Barnes v. Patch*, 8 Ves. 604.

1. The word "estate" means real or personal property according to the intention of the testator, *Archer v. De Neale*, 1 Peters 585; *Stump v. De Neale*, 2 Cranch C. C. 640; *Den v. Snitcher*, 2 Gr. (N. J.) 53. In *Birdsall ads. Applegate*, Spencer 244, where there was a gift to the widow of all testator's personal property and a legacy out of the proceeds of the sale of the real estate, a gift of "the residue of my estate" was restricted to the

proceeds of sale of the real estate. In *Clark v. Hyman*, 1 Dev. L. 382, a gift of "all my property, personal and perishable," with direction to pay testator's debts out of it and divide the residue among testator's heirs, was restricted by the context to the personal property. So, too, the "residue of my furniture and estate, whatever and wherever it may be," *Bullard v. Goffe*, 20 Pick. 252; or "my worldly goods of all sorts and kinds," *Bradford v. Bradford*, 6 Whart. 236.

Thus, in *Wilkinson v. Merryland*, (b) one having lands in A, B and C, the latter being a forfeited mortgage in fee, devised the lands in A and B to several persons and their heirs, and legacies to other persons; and then devised all the rest of his goods, chattels, leases, *estates*, *mortgages*, debts, ready money, plate and other goods whereof he was possessed, unto his wife, after his debts and legacies were paid, and made her executrix. It was urged that the fee simple in the lands in C passed by the words "*estates*" and "*mortgages*." But the court (Croke, Jones and Berkeley) were of opinion, [without deciding the point,] that these words, being coupled with personal things, must have meant *estates* and *mortgages* for years, and rather by *reason of the words "whereof I am possessed," (c) which were applicable more properly to personal than to real estate.

So, in *Cliffe v. Gibbons*, (d) Lord Cowper expressed an opinion, that a devise of all the testator's "*estate*, goods and chattels," did not pass land where there had been no mention of land before; but that it did where land had been devised in a preceding part of the will. The former proposition is clearly inconsistent with several decisions, particularly *Tanner v. Morse*, (e) and *Doe d. Wall v. Langlands*, (f) stated in the sequel.

In *Marchant v. Twisden*, (g) a testator, after bequeathing several pecuniary legacies, devised thus: "All the rest and residue of my *estate* and chattels, *real* and personal, I give and devise to my wife, whom I make to be my executrix." The Lord Keeper held that the lands did not pass; for, in the first part of the will, the testator having given only legacies, and not lands, by the residue of his "*estate*" must be intended estate of the same nature as that before devised. The devise was, as if he had said, "all the rest of my estate, whether chattels real or personal."

No case has gone so far as this in restraining the word *estate*. Nothing was more obvious than to consider the word "real" as applying to "*estate*," and "personal" to "chat-

"Goods, chattels, leases, estates, mortgages," &c.

"Estate, goods and chattels."

"Estate and chattels, real and personal."

Remark on *Marchant v. Twisden*.

(b) Cro. Car. 447, 449, Sir W. Jones 380. 141; *Stokes v. Salomons*, 9 Hare 81.]

(c) But, as to these words, see *Hogan v. Jackson*, Cowp. 299; *Pitman v. Stevens*, 15 East 505; *Noel v. Hoy*, 5 Mad. 38; (d) 2 Ld. Raym. 1326, [2 Eq. Cas. Ab. 301, pl. 17.]

(e) *Cas. temp. Talb.* 284, *post* § 2. (f) 14 East 370, *post* § 2.

(g) *Gilb. Eq. Cas.* 30, [1 Eq. Cas. Ab. stated *post*]; *Warner v. Warner*, 15 Jur. 211, pl. 22.]

tels," corresponding as they respectively do in local order; and such, it is confidently apprehended, would be the construction of the devise at this day. Indeed, in subsequent cases, the real estate, we shall see, has been held to pass by words of far inferior force. (*h*)

The next authority for the restricted construction is *Doe d. Bunny v. Rout*, (*i*) where the words of the will were as follow: "I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and subject thereto I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing, my property, of what nature or kind soever, to and for her own proper use and disposal;" and the testator appointed A. R. executrix. The Court of C. P. held, that an intention to pass land could not be clearly collected from these words.

It deserves notice, that in the three last cases, in which the words "estate," and "property," were confined to personal estate, in consequence of the *society* in which they were found, there was no preceding devise or mention of real estate; a circumstance which, though not conclusive, was in each instance adverted to, and has generally been considered as having weight in the exclusion of real estate, by demonstrating that the testator had not property of that species in his contemplation when he made his will.

In *Woollam v. Kenworthy*, (*k*) however, the word "estate" in a residuary clause was restricted to personal property, by the controlling effect of the context, although the will contained a specific devise of lands. The testator, after devising a fee-farm rent to trustees, upon formal trusts for sale, and directing his household furniture, &c., to be sold, declared, as to the money to arise from the sale of the rent thereinbefore devised in trust to be sold, as also the moneys to arise from the sale of his household furniture, &c., "*and from all other his estate and effects, of what nature or kind soever, and wheresoever,*" that the same should be chargeable with his legacies; and the residue divided into shares,

"Stock in trade, &c., and every other thing, my property, of what nature or kind soever."

As to fact of will containing no other mention of real estate.

Words "estate and effects" restricted to personality by the context.

(*h*) *Hogan v. Jackson*, Cowp. 299; *Hopewell v. Ackland*, 1 Com. 164; *Huxtep v. Brooman*, 1 B. C. C. 437; *Pitman v. Stephens*, 15 East 505, all stated *post*.

(*i*) 7 Taunt. 79.

(*k*) 9 Ves. 137. [In *Sanderson v. Dobson*, 1 Ex. 141, the word "estate" was held to be restricted by the context; but the Court of C. P. held *contra*, 7 C. B. 81, and this was followed by *Wood, V. C., Dobson v. Bowness*, L. R., 5 Eq. 404, same will.]

which the testator bequeathed to various persons. There was the usual authority to the trustees to give receipts to the purchasers of the *fee-farm rent*. [It will be observed that there was no actual devise or direction for sale of the "estate," and] Lord Eldon, after premising that the question whether the words "all my estate and effects" will include real estate or not, depends, first, on the immediate context of the will, secondly, on the general form and scheme of the will as demonstrating the intention, held, that the testator, who had actually devised certain real estate to trustees upon particular trusts for sale, could not be understood to mean that another estate should be clothed with the same trusts in the hands of the heir, by the mere insertion of the word "estate."

In *Bebb v. Penoyre*, (*l*) real estate was held not to be included in a devise of *the rest and residue*, on the ground of the restraining effect of the immediate context, although there was a previous devise of land in the same will. The testator, after various devises and bequests, concluded his will in the following words: "I order the lease of my house, with all the furniture (except the eight worked chairs), to be sold, and *all the rest and residue* to be divided among the four daughters of A, share and share alike; and I appoint C and D executors." It was contended, that the reversion in fee (*m*) of a moiety of certain houses devised by the will for the life of the devisee, passed by the words "rest and residue." But Lord Ellenborough thought that these words, in the place in which they stood, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate. He considered the division ordered was to be made by the executors immediately afterwards named.

In the two next cases the general words were followed by an enumeration of particulars, which were held to be explanatory and restrictive of the prior expressions. Thus, in *Timewell v. Perkins*, where (*n*) a testator devised in these words, "All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my *estate*, consisting in ready money, plate, jewels, leases,

(*l*) 11 East 160. [But see now *Attree v. Attree*, L. R., 11 Eq. 280; *Smyth v. Smyth*, 8 Ch. D. 561.]

(*m*) As to the operation of these words to carry a fee, see ch. XXXIII., § 4.

(*n*) 2 Atk. 102; see also *Doe v. Rout*, 7 Taunt. 79, ante p. *717.

judgments, mortgages, or in any other thing whatsoever or wheresoever, I give unto A. H. and her assigns forever." In the preamble of the will occurred the clause, "as touching the [temporal (o)] estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land not described in the will passed under the residuary clause. Fortescue, J., held that it did not, relying on the analogy of the case to *Wilkinson v. Merryland*.

In the case just stated, there was a preceding specific devise of land ; but the intention to confine the word "estate" to personalty was inferred from the subsequent explanatory words of description ; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate. (*p*) *Timewell v. Perkins* is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent occasions.

Remark on
Timewell v.
Perkins.

*So, in *Roe d. Helling v. Yeud*, (*q*) where a testator after giving certain legacies, [added "Item, I give to A, B, C, D and E, whom I appoint my executors] and to whom I give *all the remainder of my property, whatever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book debts and securities in the Witham Drainage, in Lincolnshire, and funded property." The question was whether real estate passed. The court held that it did not ; considering that the enumeration at the end of the clause was explanatory of the words "remainder of my property." (*r*)

"Property"
restrained by
subsequent
explanatory
particulars.

Timewell v. Perkins, and *Roe v. Yeud*, were much relied upon by Gibbs, C. J., in *Doe v. Rout*, (*s*) already stated.

[It is a wholly different question, where a will contains two distinct devises, either of which would alone be sufficient to carry the property, under which of the two it shall be held to

Copyholds ex-
cluded from a
gift of "prop-

[*(o)* As to this word see *Tanner v. Wise*, 3 P. W. 295.]

[*(p)* See *Hopewell v. Ackland*, 1 Com. 164, [and *Wilce v. Wilce*, 7 Bing. 664,] stated *post*.

[*(q)* 2 B. & P. N. R. 214. ["It seems that the words beginning 'whom I ap-

point,' and ending with 'this my will,' are to be construed as included in a parenthesis." Id. 215, n.

[*(r)* But observe the tone of Lord Ellenborough's remarks on this case in *Doe v. Langlands*, 14 East 373.]

[*(s)* 7 Taunt. 79 *ante* p. *717.

erty" by subsequent disposition of "copyholds," pass. Thus in *Chapman v. Prickett*, (t) where a testator entitled to copyholds, which he had surrendered to the use of his will, devised his "freehold messuages, stock in the funds, money and debts and all shares or *property* of which he might die possessed or entitled to" to trustees in trust to pay the rents of his freeholds and leaseholds and the dividends of his stock and shares to his wife for life, and afterwards to make division by sale or otherwise of his said freeholds, and to transfer all stock or shares his *property*, estate and effects equally among his children. By codicil he devised his *copyhold* estate to his wife for a term, and afterwards directed it to be sold "for the benefit of his children as directed by the will," but did not actually devise the copyhold to the trustees. It was held that no estate in the copyholds passed to the trustees by the word "*property*" in the will. Tindal, C. J., observed that the general effect of the disposition of the copyhold by the codicil was the same as that of the freehold which had already passed by the will, viz., that the wife of the testator should receive the rents and profits during her life, and after her death a sale should take place and a division be *made among the children. So that the disposition of the copyhold made by the codicil was unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

And it has been elsewhere noticed as an established rule that a gift once clearly expressed in a will shall not be cut down by ambiguous expressions contained in a codicil. It was mainly on this principle that in *Molyneux v. Rowe*, (u) a devise of "real estate" to A was held not to be affected by a codicil by which the testator gave "all his estate, household furniture, linen, china, and all other his personal property" to B.]

II.—But it is not to be inferred from the preceding cases, that the words *estate* and *property*, and others of the like import, when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *ejusdem generis*. On the contrary, the presumption generally is against such a construction, as it supposes the testator to use words in another sense than that which judicial construction has given to them, and frequently in a sense which is fully expressed in the con-

Estate, property, &c., when not restricted to personality.

[(t) 6 Bing. 602. See also *Acheson v. Fair*, 3 D. & War. 512, which is analogous to *Wilde v. Holtzmeier*, 5 Ves. 811. (u) 8 D., M. & G. 368, *diss.* Turner, L. J.]

text, and therefore renders them inoperative.² It should be observed, however, that the circumstance of there being other words adequate to carry the whole personal estate, always affords an argument for making the words under consideration include land, since the contrary construction reduces them to silence; an argument upon which, it will be seen, great stress was laid by Lord Hardwicke in *Tilley v. Simpson*, (x) stated in the sequel. But it must be remembered, that the fact of the word being wanted to give completeness to the disposition of the personal estate, does not raise so strong an argument in favor of the restrictive construction: since there is no reason why a testator should not have used the words for both purposes. (y)

2. In general the word *estate* will include real estate, *Blagge v. Miles*, 1 Story C. C. 426; *Houghton v. Hapgood*, 13 Pick. 154; *Andrews v. Brumfield*, 32 Miss. 107; *Den v. Drew*, 2 Gr. (N. J.) 68; *Norris v. Clark*, 2 Stockt. 51; *Jackson v. Merrill*, 6 Johns. 191; *Jackson v. Delancy*, 11 Johns. 365, affirmed 13 Johns. 537; *Turbett v. Turbett*, 3 Yea. 187; *Monroe v. Jones*, 8 R. I. 526; *Cole v. Clayborn*, 1 Wash. (Va.) 262; *Doe v. Kinney*, 3 Ind. 50; *Davies v. Miller*, 1 Call 127; *Hawkins on Wills* 53; 2 Redf. on Wills 126. It has been held to mean "estate not already disposed of by will," *Blewer v. Brightman*, 4 McCord 60; and "my whole estate according to law" has been held to mean the residue after payment of debts and to include proceeds of sale of land, *Morris v. Warren*, 4 Houst. 414. But it will not include the wife's separate estate, *Croftwaight v. Hutchinson*, 2 Bibb 407.

So the word "*property*" will in general include real property, *Wheeler v. Dunlap*, 13 B. Mon. 291; *Laing v. Barbour*, 119 Mass. 523; *Hunt v. Hunt*, 4 Gray 190; *Morris v. Henderson*, 37 Miss. 492; *Jackson v. Housel*, 17 Johns. 281; *Rossetter v. Simmons*, 6 Serg. & R. 452; *Monroe v. Jones*, 8 R. I. 526; *Den v. Payne*, 5 Hayw. (Tenn.) 104; *Smith v. Hutchinson*, 61 Mo. 83; 2 Redf. on Wills 126.

A bequest of all the interest of testator in a law suit, will pass certain real

estate in controversy in that suit, *Swift v. Lee*; 65 Ill. 336; and a devise in the words, "*likewise one-half of all and every thing that shall fall to me, at my mother's decease*," has been held sufficient to pass real estate, *Burke v. Chamberlain*, 22 Md. 298. It was said by Moncre, J.: "When a man makes his will, the presumption, in the absence of evidence to the contrary, is, that he intends thereby to dispose of his whole estate. He often manifests this intention at the commencement of the will by using such language as this: 'I dispose of my estate in the following manner.' This or similar language in the beginning of a will has been held in several cases sufficient to enlarge the meaning of words used in the residuary clause so as to make them embrace real estate, though the words in their proper signification were more applicable to personality, and that even though the effect of such construction would be to disinherit the heir." *Smith v. Smith*, 17 Gratt. 268, 274.

(x) 2 T. R. 659, n., *post* p. *722.

[(y) *Kindersley v. C.*, laid down the rule generally, that if the other words were not sufficient to comprise the whole personal estate the word "*estate*" would not embrace realty, *D'Almaine v. Moseley*, 1 Drew. 632; but although Lord Hardwicke's remarks in *Tilley v. Simpson* certainly favor this doctrine, the modern cases are founded on a principle which is in-

The following cases seem fully to sustain the position, that to warrant the confining of the word "estate" and other such general words have been held to be unrestricted. expressions to personal estate, there must be a clear indication of *an intention in the will so to confine them; for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, *i. e.*, their unrestricted sense.

Thus, in *Terrell v. Page*, (z) where the testator bequeathed certain legacies, and devised some lands, and then devised as follows:—"All the rest and residue of my money, goods and chattels, *and other estate whatsoever*, I give to J. S., whom I make my executor;" it was held, that the lands not previously devised passed under the latter clause.

So, in *Scott v. Alberry*, (a) where the testator, "as touching the worldly estate it had pleased God to bestow" upon him, devised in these words:—"I give to my cousin T. S., all that my parcel of land lying in W. A. Item, I give to my said cousin T. S., my wearing apparel, linen, books, *with all other my estate whatsoever and wheresoever*, not hereinbefore given and bequeathed; and him, the said T. S., I make the sole executor of this my will for performing the same." The question was, whether the reversion in fee in the lands in W. A., before devised to T. S., (b) which were copyhold surrendered to the use of testator's will, passed under the latter devise; and it was held that it did.

Again, in *Tilley v. Simpson*, (c) where a testator, after declaring his intention to dispose of all his worldly estate, and making several devises to different persons, devised *all the rest and residue of his money, goods, chattels and estate whatsoever*; Lord Hardwicke held that the fee passed: he said, where the court had restrained the word "estate" to personal estate only, it had been where the intention of the testator that it should be so used had appeared; as where it had stood coupled with a particular description

consistent with it; see particularly Lord Brougham's judgment in *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76, 11 Jur. 193; and *Scott v. Alberry*, Com. 337, stated p. *722, is an express decision to the contrary.]

(z) 1 Ch. Cas. 262, 1 Eq. Cas. Ab. 209, c. 11.

(a) Com. 337, 8 Vin. Ab. 229, pl. 14; [see also *Awbrey v. Middleton*, 4 Vin. Ab. 460, pl. 15, 2 Eq. Ab. 497, pl. 16.]

(b) As to indefinite devises, see ch. XXXIII.

(c) In Chancery, 1746, before Lord Hardwicke, stated 2 T. R. 659, n.; and see 1 Cox 362.

of part of the personal estate, as a bequest of all mortgages, household goods and estate, in which the preceding words were not a full description of the personal estate; that if the testator had said, "All the rest and residue of my personal estate and estates whatsoever," a real estate would have passed; (d) that this bequest amounted to the same, for the word "chattels" is as full a description of the personal estate as the *words "*personal estate*;" that therefore, *when he had used words comprehending all his personal estate, and then made use of the word "estate," that word would carry a real estate.* That the word "whatsoever" was used here, which was the same as if he had said *of whatever kind it be*; and, if that had been the case, it would most certainly have carried the real estate. He observed that *Terrell v. Page* was very material to the present question, and he thought could not be distinguished: the only difference was, in that case there was the word "other," which he did not think could distinguish it. If the devise had been, *and all the rest and residue of my household goods, mortgages and all other estate*, he did not think the words would have extended to the testator's real estate.

Lord Hardwicke's reliance upon the fact, that the other words were adequate to describe the personal estate.

So, in *Jongsma v. Jongsma*, (e) where a testator gave to his executors "all his goods, estates, bonds, debts, to be sold." The question was, whether this would pass a copyhold estate surrendered to the use of the will. Sir Lloyd Kenyon, M. R., said that, according to the case of *Tilley v. Simpson*, (f) wherever the word "estate" or "estates" was restrained to personalty, it was done upon the ground of the testator's showing his intention by joining it with words which related to personalty only; but, on the other hand, *where such other words were in themselves sufficient to pass all the personal estate, then, in order to give some effect to the word "estate," it was holden to pass realty.* In this case, the word "goods" seemed to be sufficiently comprehensive; and the copyhold, therefore, passed by the word "estates."

"Goods, estates, bonds, debts."

In *Hogan v. Jackson*, (g) a testator, after commencing his will with

[(d) As to this, see *Jones v. Robinson*, 3 C. P. D. 344.]

(f) Which he denominated *Tiddy v. Simms*.

(e) 1 Cox 362; see also *Smith v. Coffin*, 2 H. Bl. 445; *Roe d. Penwarden v. Gilbert*, 3 Br. & B. 85; *Churchill v. Dibben*, 9 Sim. 447, n.; [*King v. Shrivess*, 4 Moo. & Sc. 149, 5 Sim. 461.]

(g) Cowp. 299, 3 B. P. C. Toml. 388; [see also *Lord Torrington v. Bowman*, 22 L. J., Ch. 236, where there was no previous devise of land.]

Residue of
"effects, real
and personal,"
after an ex-
press devise of
lands.

the words "as to my worldly substance," devised certain lands to his mother M. for life: and, after giving certain legacies, to be raised out of those lands, concluded as follows:—"I give and bequeath unto my dearly-beloved mother M. all the remainder and residue of *all the effects, both real and personal, which I shall die possessed of.*" It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects" and "possessed," were applicable rather to personal than real property; but the court held that the clause amounted to a disposition of the whole of the testator's real and personal estate.

*This is a strong decision, and has been much cited in subsequent cases. [Then, and long after, it was held to be] clear that the word *effects*, without *real*, would not, *proprio vigore*, comprehend land, though followed by the words, "of what nature, kind or quality soever." (*h*)

Remark on
Hogan v.
Jackson.

In *Grayson v. Atkinson*, (*i*) a testator, prefacing his will with the expression, "as to all my temporal estate," gave certain legacies, and directed A to sell any part of his real and personal estate for the payment of his debts and legacies; and, as to all the rest of his "*goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements*, share in the copperas works," &c., he gave the same to A. Lord Hardwicke held that this devise carried a fee, though he did not think that the words "goods and chattels, real and personal," would have included the lands, if the deviser had not gone on to explain himself by the subsequent words, "as houses," &c.; (*k*) ["all the rest," &c., he thought plainly related to something mentioned before, and that mentioned before which he was about to dispose of was, "all his temporal estate," which passed a fee when the testator had one.]

"Goods and
chattels, real
and personal,
as houses, &c."

In *Fletcher v. Smiton*, (*l*) a testator, after directing all his debts to be paid, gave to M., his wife, all his household goods, &c., and a legacy and annuity; and then proceeded as follows:—"The profits of my four shares in the corn market during her life; also the income

(*h*) *Camfield v. Gilbert*, 3 East 516; *Doe d. Chillcott v. White*, 1 East 33; *Macnamara v. Lord Whitworth*, Coop. 241; [*Doe d. Hick v. Dring*, 2 M. & Sel. 448; *Doe d. Haw v. Earles*, 15 M. & Wels. 450. But see cases *post*, § 6.] the devise would not have carried real estate, it is difficult to find a satisfactory ground for giving to the devisee the fee. His lordship seems to have relied more upon the introductory words for this purpose than is consistent with later authorities. See *infra*.

(*i*) 1 Wils. 333.

(*k*) If, without the words houses, &c.,

(*l*) 2 T. R. 656.

and profit of my estate as follows, during her life, as follows, my lands lying, &c., (enumerating them,) as also the residue of my personal estate to be laid out in bank annuities; and then my wife to have the income, during her life only, of this and the estates before mentioned; and after her decease, as follows:—I give to W. the income of my four shares in the corn market for his natural life; and all the rest of *my estates*, with all moneys in securities, to be divided in equal shares, to "B, C, &c. The question was, whether the reversionary interest in the shares of the corn market, which were freehold of inheritance, passed to B, C, &c. It was contended that it did not; for that the word "estates" in the last clause *must have the same signification with the same word in the first clause, where it could not possibly extend to the corn market; but the court, relying much on *Tilley v. Simpson*, held that the reversion in fee passed.

Realty passed by the word "estates," although the word was before used exclusively of the particular subject.

In *Smith v. Coffin*, (m) a testator, after prefacing his will with the words, "as to my worldly estate," &c., and devising certain freehold lands, gave and bequeathed all the residue of his "goods and chattels, rights, credits, *personal and testamentary estate whatsoever*," to his wife, for her own use and disposal. The real estate was held to pass. And where (n) there were again the prefatory expressions, "as to my temporal estates and effects," and a devise of all the testator's lands to J. G., the reversion in fee in those lands was held to pass to him under these words:—"And all the rest and residue of my goods and chattels, *personal and testamentary estate and effects whatsoever*, I give and bequeath unto the said J. G., whom I make whole and sole executor."

"Goods and chattels, rights, credits, personal and testamentary estate," held to pass land.

By confining the devise to personal estate, in the two preceding cases, the words "and testamentary" would have been rendered inoperative.

So, in *Doe d. Andrew v. Lainchbury*, (o) where a testator said,—“As to the little money and effects with which the Almighty has intrusted me, I dispose thereof as follows;” and, after several devises of land, concluded thus:—"And as to all the rest, residue and remainder of my money, stock, *property and effects*, of what kind or nature soever, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew J. and my niece S, for to be equally divided between

Residue of "money, stock, *property*, and effects," held to carry a fee.

(m) 2 H. Bl. 445.

material word); [see also *Doe d. Evans*

(n) *Roe d. Penwarden v. Gilbert*, 3 Br. & B. 85 (the marginal note omits the

v. Walker, 15 Q. B. 28.]

(o) 11 East 20.

them, share and share alike; and I do hereby also appoint my said nephew J. and my said niece S. executor and executrix, and likewise joint and equal residuary legatees," &c.; it was held that real estate passed, which construction Lord Ellenborough considered to be strengthened by the circumstance of the testator having, in a preceding part of his will, directed money to be laid out in the purchase of land, "to be added to his other adjoining *property*," which he said gave a standard of his meaning of the word "*property*," and showed that he meant by it real estate. ³

[Much reliance was placed on this decision in *Edwards v. Barnes*, (*p*) where a testator "gave, devised and bequeathed to *his wife all his freehold and leasehold, and all his money, securities for money, stock in government funds, goods, chattels and all other his *property* whatsoever and wheresoever, to hold the same unto and for the use of his said wife, her heirs, executors," &c. The Court of C. B. were of opinion that copyholds, which had been surrendered to the use of the will, passed by the expression "all other his *property*."]
"Freehold and leasehold, money, stock, goods, chattels, and other *property*," held to pass copyholds.

A valuable judgment was delivered by Lord Brougham in a case, (*q*) where a testator directed any shares he might have in a vessel to be sold "for the benefit of his estate." And after making some specific devises of "houses and lands," in some of which the fee was not exhausted, and bequeathing to his wife certain specific chattels "which she had from her father's estate," he gave "all the remainder of his estate that was then in his possession or might thereafter be his" to his wife; and directed "his estate," after payment of debts and legacies, to be "kept together" until the time thereby appointed for "dividing" it; and declared his wife entitled, in a certain event, to one-third of "his personal estate." It was argued that the trusts and purposes of the will showed the testator's mind to be directed to personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term estate. Lord Brougham observed (in effect) that "estate" meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty upon which the term could operate; that, when
"Estate" held to pass realty notwithstanding context.

3. In *Howland v. Howland*, 100 Mass. 222, after a legacy absolutely and a devise for life to his widow, "but on her decease the remainder of *all the property* that I give to my said wife," over, the word *property* was restricted to the realty. See also *Pruden v. Paxton*, 79 N. C. 446. [*(p)* 2 Bing. N. C. 252. (*q*) *Mayor, &c., of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76, 11 Jur. 193.]

reality was meant to be excluded, the expression *personal* estate was used; and that the will was to be construed *reddendo singula singulis*, by which method all parts of it became consistent; so that there was not that clear intent on the will to restrict the meaning of the term estate which was necessary to prevent its natural operation in comprising reality as well as personalty. The unexhausted reversion was therefore held to pass.]

In most of the preceding cases the will contained specific devises of land; a circumstance which, as before observed, always favors the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively establishing the exclusion of real estate from such terms, though associated with words descriptive of personal property only. On the contrary, real estate has sometimes been held to pass in cases of this nature.

Circumstance of there being a prior devise of lands.

Thus, in *Tanner v. Morse*, (r) real estate was held to pass under the following words:—"As to my temporal estate, I bequeath to my nephew T. (who was the heir-at-law) the sum of £50;" then follow several legacies: "And *all the rest and residue of my estate, goods and chattels whatsoever*, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." Lords King and Talbot laid much stress upon the words "temporal estate," in the introductory clause, [to which it was said the words "rest and residue" must have relation.]

Although no such devise, lands passed in following cases.

Residue of "estate, goods and chattels."

So, in *Doe d. Wall v. Langlands*, (s) where a testator after giving several pecuniary legacies, bequeathed as follows:—"to R. D., and E. W., I give and bequeath *the residue of my property, goods and chattels*, to be divided equally between them, share and share alike;" it was contended, that the word "property" was restrained by the subsequent words, the clause being read *videlicet* "my goods and chattels;" but Lord Ellenborough held that the more obvious and natural sense was, that they are to be taken *cumulatively*, that is, as *property and goods and chattels*, and, consequently, that the real estate passed under the former word.

Residue of "my property, goods and chattels."

Again, in *Doe d. Morgan v. Morgan*, (t) where a testator, after bequeathing two pecuniary legacies, devised as follows:—"All my *property* and effects of all claims that I shall have,

—"all my property and effects."

(r) Cas. temp. Talb. 284, [3 P. W. 295; (t) 6 B. & Cr. 512, 9 D. & Ry. 633; see also *Lumley v. May*, Pre. Ch. 37.] see also *Bradford v. Belfield*, 2 Sim. 264.

(s) 14 East 370.

I give to my brother J. M., but my mother is at liberty to give £1000 of my property where she please." It was contended, that the gift of the pecuniary legacies, the use of the word "effects" conjunctively with "property," and the clause respecting the £1000, showed that the testator, by the latter term, intended to denote personal estate only; but the court held that the real estate passed.

A similar construction prevailed in *Doe d. Evans v. Evans*,^(u) where a testator, after bequeathing certain articles of personal estate, gave, bequeathed and devised to his wife A, all his *money, securities for money, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same might or should be at the time of his death.

[In *Attree v. Attree*,^(x) a testatrix gave a certain house and garden "All the rest," (which were leasehold) to A, then bequeathed several pecuniary legacies, and proceeded, "And all the rest to be divided between the daughters of B." It was held by Sir J. Romilly, that "rest" included the rest of all the property, real as well as personal. And in *Smyth v. Smyth*,^(y) where a testator made his will thus, "I give to A £100, also to B £50; and lastly, I give my sheep and all the rest, residue, moneys, chattels and all other my effects to be equally divided among my four brothers, (naming them) whom I appoint executors;" it was held by Sir R. Malins, V. C., that "rest and residue" were sufficient to carry real estate, and were not cut down by the subsequent enumeration. Indeed, he thought the realty would pass under the word "effects" alone.]

The last five cases are certainly important authorities, and [with others since decided^(z),] they demonstrate the inclination of the courts at the present day, to hold lands to pass under

^(u) 9 Ad. & Ell. 720, 1 Per. & D. 472; [and in *D'Almaine v. Moseley*, 1 Drew. 633, Kindersley, V. C., said he thought no indication of intention was afforded by the absence of a previous gift of real estate. It seems also, from the case in the text, and *Dobson v. Bowness*, L. R., 5 Eq. 404, that such words as "wheresoever the same might be," &c., are not (as sometimes argued) to be understood as showing that the testator contemplated shifting or changeable property only.

^(x) L. R., 11 Eq. 280.

^(y) 8 Ch. D. 561. As to the word "effects," *vide post*, § 6.

^(z) *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *O'Toole v. Browne*, 3 Ell. & Bl. 572, (in which it was decided that under 1 Vict., c. 26, after-purchased lands passed by similar words); *Patterson v. Huddart*, 17 Beav. 210; *In re Greenwich Hospital*, 20 Id. 458; *Gyett v. Williams*, 2 J. & H. 429; *Hamilton v. Buckmaster*, L. R., 3 Eq. 323 (in none of which was there a devise of lands specifically); *Footner v. Cooper*, 2

words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed. [The old rule is in fact reversed; for it is now settled that words such as "property" and "estate," capable of including real with personal estate, will not be deprived of their full force without evidence that they were intended to be used in a more confined sense, (a) whereas formerly the burden of proof was on the other side. (b)]

III.—Sometimes words adequate to comprise land have been *con-
fined to personal estate, from their association with the
legatee's nomination to the executorship, which has been
considered as explanatory and restrictive of the general
expressions to that species of property which was connected with the
character of executor.

Devise asso-
ciated with
nomination to
executorship.

As in *Shaw v. Bull*, (c) where one seized in fee of five messuages, by will devised two to his wife for life, remainder to his two daughters in fee; the third messuage to his wife and her heirs; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all; and, if she did not make provision for the payment of his legacies in her lifetime, that it should be lawful for the legatee, after her death, to sell the said messuage, to satisfy the legacies out of the value thereof. Then followed this clause, on which the question arose:—"And all the overplus of my estate to be at my wife's disposal, and make her my executrix." Blencowe, J., said if he had at first devised to his wife all his estate, this (the fifth) house would have passed to her; but compare this clause with the subsequent words, "and I make her my executrix," it shows that his intent was to grant her such estate as she was capable of as executrix. He considered "overplus" to refer to the price of the house, after payment of legacies.

"Overplus of
my estate" re-
stricted to
personalty by
this associa-
tion.

It is to be observed, however, that this construction renders the

Drew. 7; *Meeds v. Wood*, 19 Beav. 210; Beav. 212.

Hawksworth v. Hawksworth, 27 Beav. 1; (b) See per Trevor, C. J., *Shaw v. Bull*,
Dobson v. Bowness, L. R., 5 Eq. 404. 2 Eq. Cas. Ab. 320, 321.]

(a) See per Bayley, J., *Doe v. Morgan*, (c) 12 Mod. 592, 2 Eq. Cas. Ab. 320,
6 B. & Cr. 512; *Patterson v. Huddart*, 17 pl. 8.

Remark on
Shaw v. Bull.

words in question nugatory, since the appointment of the wife to be executrix was itself, in the then state of the law, a disposition of the whole personal estate; a species of argument to which great attention is paid at this day, for in modern cases no principle is more conspicuous than an anxiety to give effect to every word of the will. It is impossible to reconcile this case with the general current of authorities. (d)

Although it is indisputably clear that the word *lands* will carry real estate, notwithstanding it be collocated with words descriptive of personal property only (e); yet in several early cases (f) it has been decided, that where a testator appoints another executor of all his goods, *lands*, &c., he refers to such lands as the person may take as executor,

"Executrix of
all my goods,
lands, and
chattels."

namely, leaseholds; and accordingly real estate does not pass. Thus, in *Piggot v. Penrice*, (g) freehold lands were held not to pass under the *words, "I make my niece executrix of all my goods, lands and chattels," although the testator had no leaseholds. (h) It was said that by this construction the word *lands* was not (as objected) useless, and to be rejected; for that, in all probability, there might be rents in arrear of those lands, which would pass to the niece by her being made executrix. This explanation, however, fails to show that any efficient signification was given to the word "lands," since it is clear the executorship would have entitled the niece to the arrear of rent. The word "chattels," too, was sufficient to pass any leasehold lands of which the testator might have been possessed at his death.

"Executor of
all my lands
forever and
leasehold prop-
erty," not so
restricted.

In *Doe d. Gillard v. Gillard*, (i) real estate was held to pass under the words, "I do make, constitute and appoint R. G. my whole and sole executor of all my lands forever, and leasehold property here or at Beeston." The question principally agitated was, whether the restrictive words "here or

(d) See *Noel v. Hoy*, 5 Mad. 38, stated next page.

(e) *Roe d. Walker v. Walker*, 3 B. & P. 375, stated *post* p. *748.

(f) 1 Roll. Ab. 613, 1 Eq. Cas. Ab. 209, pl. 12; see also *Clements v. Cassye*, Noy 48.

(g) Pre. Ch. 471, 1 Eq. Cas. Ab. 209, pl. 13.

(h) This circumstance does not seem to be very material; for, as such a bequest

operates upon all the leaseholds of the testator at his death, the fact of his having or not having any such at that period, does not mark his intention at the making of the will. See Lord Eldon's judgment in *Wright v. Atkyns*, as reported Coop. 111, see p. 123; but as to which see ch. XXIX.

(i) 5 B. & Ald. 785; and see *Marret v. Sly*, 2 Sid. 75, *ante* p. *357, n.

at Beeston," applied to both freehold and leasehold or to leasehold lands only; and it was held that they were confined to the latter, and that the devise of the freehold lands was general, without any local restriction.

Whatever opinion may be formed of the case of *Piggot v. Penrice*, it is not necessarily overruled by this case, where the will contained additional expressions, strongly aiding the construction adopted.

So, in *Noel v. Hoy*, (*k*) a copyhold estate surrendered to the use of the will was held to pass under the following disposition: "In respect of worldly affairs, I cannot better manifest my love and attachment to my family, than in nominating (which I hereby do) my dearly beloved and most amiable wife A. F. M., the sole executrix of this my will, thereby *bequeathing to her all the property of whatever description or sort that I may die possessed of*, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my children," &c. Sir J. Leach, V. C., thought that the criticism upon the words "possessed of," and "appropriated," on which had been founded the argument for excluding the copyholds, was too nice.

"All the property I may die possessed of," held to include land.

*Again, in *Thomas v. Phelps*, (*l*) where the testator, as to his worldly estate, gave, devised and disposed of the same as follows; and then, after giving some pecuniary legacies, proceeded in these words:—"I also give and bequeath the lease of the colliery of L. to my son J. P.; him and my daughter E. P. I do make, constitute and appoint my joint executor and executrix of this my last will and testament, *of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed of whatsoever nature or manner it may be*, only my household furniture, which I give to my daughter who lives the longest single, and after her decease or marriage to be sold and equally divided between my remaining children," &c. Sir J. Leach, M. R., held, that the real estate passed by this devise, the words being equivalent to a gift of all the testator's property.⁴ He observed, that the exception of the household furniture was of little weight; for where the prior words imported real as well as personal estate, it mattered not that the exception to the gift happened to be of personal chattels only. (*m*)

"All that I possess in any way belonging to me."

(*k*) 5 Mad. 38.

(*l*) 4 Russ. 348.

4. See *Birdsall ads. Applegate, Spencer* 244; *Clark v. Hyman*, 1 Dev. L. 382;

Bullard v. Goffe, 20 Pick. 252; *Swift v. Lee*, 65 Ill. 336; *Burke v. Chamberlain*, 22 Md. 298.

[(*m*) See also *Steignes v. Steignes*, Mos.

So, in *Doe d. Pratt v. Pratt*, (*n*) where a testator directed that his debts and funeral expenses should be paid by his executor thereafter named; and after giving two life annuities of £2 10s. each, and a legacy of 5s. to J. P., his heir-at-law, he appointed W. P. *whole and sole executor of all his houses and lands situate at F.*: it was held, after an extensive review of the authorities, that the houses and land at F. passed to W. P., and that he took an estate in fee.

These cases evince that little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction; and *Thomas v. Phelps* also shows that an exception of articles of personalty affords no ground for cutting down the general words of the devise.

IV.—The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for *excluding such estates from words of general description, capable, *ex vi terminorum*, of comprehending property of that species.

In *Doe d. Spearing v. Buckner*, (*o*) a testator prefaced his will with the words, “As to my estate and effects, both real and personal, I dispose thereof in manner following.” Then, after giving some pecuniary legacies, and an annuity, which he charged on a freehold messuage in W., he concluded as follows:—“All the rest, residue and remainder of my *estate* and effects of any and what nature or kind soever or wheresoever, I give and bequeath the same unto C. B., and J. R., *their executors or administrators*, in trust that they shall from time to time *add the interest thereof to the principal*, so as to accumulate the same, as it is my will that the said residue shall not be *paid or payable*, but at the time and in the manner and to the several persons, as the said principal sum of £4000 (which was a legacy before given) is before directed to be paid.” It

296; such an exception, though of little weight to show what is excluded (see, however, *Camfield v. Gilbert*, 3 East 516, 2 M. & Sel. 454), is strong to prove what is intended to be included in the gift from which the exception is made; see *Davenport v. Coltman*, 12 Sim. 588, 598, 603; and see *Hotham v. Sutton*, 15 Ves. 319,

and other cases cited therewith, *post* ch. XXIII.; *Marshall v. Hopkins*, 15 East 309.]

(*n*) 6 Ad. & El. 180; [and see *Doe d. Hickman v. Hazlewood*, Id. 167; *Day v. Daveron*, 12 Sim. 200, stated *post* p. *740.]

(*o*) 6 T. R. 610.

was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause.⁵ Lord Kenyon observed, that the limitation to executors and administrators, and particularly the direction to add the interest *thereof* to the principal, were wholly inapplicable to a real estate.

So, in *Doe d. Hurrell v. Hurrell*, (p) a testator gave certain pecuniary legacies; and after payment thereof, and of his just debts, funeral, testamentary and incidental expenses, gave and bequeathed all the rest and *residue of his estate and effects* whatsoever and wheresoever unto A and B, their *executors, administrators and assigns*, upon trust that they should out of *such residue of the moneys and effects* that he should die possessed of, carry on, manage and cultivate the farm then in his possession, for the remainder of his term, for the joint advantage of his children (naming them), and at the expiration of the said term, upon further trust to *sell such residue of his estate and effects, or such effects as should then be upon his farm*, and divide the money among his five children. It was held that, notwithstanding the generality of the words, the nature of the trust clearly showed that the testator meant to bequeath his personal property only. It was said, that by directing the trustee at the expiration of his term, to sell such residue of his estate and effects, *or such effects as should be upon his said farm*, the testator had himself furnished a comment upon the words, "the residue of his estate and *effects," and manifested that by those words he meant only such estate and effects as constituted personal property.

[The case of *Pogson v. Thomas* (q) is probably referable to this principle. A testatrix, after making some specific devises to certain persons, "their heirs, executors, administrators, and assigns," according to the different tenures, and bequeathing a sum of money to trustees, "their executors," &c., declared that "as to all the residue of her estate and effects wheresoever and whatsoever, she gave and bequeathed the same" to the said trustees, "their executors, administrators and assigns," in trust for her sons equally; or if but one son, then in trust for him, "his executors and administrators." The Court of C. P., (r) on a case

Residue of "estate and effects to trustees, their executors," &c., held not to include real estate.

5. So, too, where the "estate" is given "in case it shall more than suffice to pay the legacies," *Havens v. Havens*, 1 Sandf. Ch. 324.

(p) 5 B. & Ald. 18.

[(q) 6 Bing. N. C. 337; see per Shad-

well, V. C., 12 Sim. 204. A gift of land to A, his executors, &c., will give A the fee, *Rose d. Vere v. Hill*, 3 Burr. 1881, *Fearne*, Posth. 144.

(r) *Absente* Tindal, C. J.

from Chancery, certified (in effect) that real estate was not included in the residuary gift.

In *Doe v. Hurrell*, (s) Lord Tenterden said, that the circumstance of the limitation being to executors and administrators and not to heirs, though not to be altogether rejected in construing a will, was not very strongly to be relied on. In *Pogson v. Thomas*, the testator had used the word "heirs" in previous devises, unequivocally relating to real estate; and the contrast deserves notice; (t) but it appears insufficient of itself to support the decision.

At all events] the mere introduction into some of the clauses relating to the subject matter of disposition, of expressions inapplicable to real property, will not in all cases confine the word "estate" to personal estate.

As in *Doe d. Burkitt v. Chapman*, (u) where a testator devised specifically certain parts of his real and personal property, and then devised and bequeathed *all the rest and residue of his estate, of what nature or kind soever*, to C for life; and, after her decease, directed that the same should be divided between certain persons; providing that, in case of their dying before their being entitled "*to have and receive*" their shares, their children should stand in the place of his or her parent; and that the share, on a certain event, *should be paid to their guardians*; it was *contended, that these provisions being applicable to personal estate only, the devise must be restrained to such estate; but Lord Loughborough and the Court of C. P. held that they could not so restrain the general and comprehensive terms used, and therefore that the real estate passed.

The expressions in this case were similar to some of those on which the argument for the restricted construction was founded in *Doe v. Buckner*; but it wanted others. Another difference between the cases is, that there all the preceding gifts related to personal estate, except, indeed, an annuity, which was charged on a freehold messuage; but, in *Doe v. Chapman*, there were devises of land in a prior part of the will. In *Doe v. Buckner*, however, the testator, in the exordium to his will, intimated an intention to dispose of all his real estate, which

Remark on
Doe v. Chapman.

As to clause
intimating an
intention to
dispose of the
whole estate.

(s) 5 B. & Ald. 18; see also *O'Toole v. Robinson v. Webb*, 17 Beav. 260.
(t) *Buchanan v. Harrison*, 31 L. J., Ch. 74; 8 Jur. (N. S.) 965; *Longley v. Longley*, L. R., 13 Eq. 133.]
(u) 1 H. Bl. 223.

did not occur in *Doe v. Chapman*. This circumstance, it will be observed, has had various degrees of importance assigned to it. Most of the judges who have held the real estate to pass, have thrown it into the argument. It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an actual disposition. (x)

The cases under consideration often present questions extremely embarrassing to a judge or practitioner, and different minds will almost unavoidably form different opinions as to the weight to be ascribed to particular expressions or circumstances of inapplicability as excluding the real estate; (y) of which we have an instance in the next case, where two judges came to opposite conclusions on the same will.

In *Newland v. Majoribanks*, (z) a testator having real estate in *Jamaica*, by his will, after charging his debts upon his real estate, bequeathed certain pecuniary legacies; and as to all the *rest, residue and remainder of his estate, of what nature or kind the same might be, and of which he might be possessed or interested in at the time of his decease, he gave, devised and bequeathed the same to A, B and C, their heirs and assigns, forever, upon trust to place the same in some public or private fund upon good security, and to receive the annual interest or produce thereof for ten years, in trust to place the same out again annually, so that the interest might become a principal; and that, at the expiration of such ten years, then his trustees, their heirs or assigns, or the major part of them, should pay and apply the annual interest of the whole of the principal money in the erection of a free school. Sir James Mansfield, C. J., was of opinion, that though the words used were sufficient to

Diversity of judicial opinion on the excluding power of expressions applying only to personality.

[(x) See 2 Ed. 145, n. (a); *Gulliver v. Poyntz*, 3 Wils. 141, 2 W. Bl. 726; *Smith v. Coffin*, 2 H. Bl. 450; *Grayson v. Atkinson*, 1 Wils. 333; *Pocock v. Bishop of Lincoln*, 3 Br. & B. 41; *Doe v. Gilbert*, Id. 85; *Saddler v. Turner*, 8 Ves. 617; *Doe v. Dring*, 2 M. & Sel. 448, 456; *Bradford v. Belfield*, 2 Sim. 272; *Sutton v. Sharp*, 1 Russ. 149; *Wilce v. Wilce*, 7 Bing. 664; and particularly *Hughes v. Pritchard*, 6 Ch. D. 24. The absence of such a clause was relied on in *Roe v. Yeud*, 2 B. & P. N. R. 214; *Doe v. Rout*, 7 Taunt. 79, 84; but stated by Lord Hard-

wicke in *Crichton v. Symes*, 3 Atk. 61, to afford no indication of intention.]

(y) The present chapter exhibits the necessity of perspicuity in this particular. If the testator intend the will to be confined to personal property, it should be clearly so expressed; and, if not, as is more generally the case, words technically adapted to describe the real estate should be employed; and in every case general equivocal expressions are to be avoided.

(z) 5 Taunt. 268.

comprehend the realty, yet that they were restrained to personal estate by the subsequent part which referred to personalty only. "Land (he said) could not be placed out, nor securities changed." Heath, J., on the contrary, thought that the words were insufficient to control the preceding devise; but as the learned judge was of opinion, that the trustees took a term of ten years only, which were expired, it was unnecessary to decide the point.

[Modern decisions have placed this question on a surer footing.

Realty held to pass notwithstanding trusts in terms applicable only to personalty.

Saumarez v. Saumarez.

Thus, in *Saumarez v. Saumarez*, (a) a testator, after giving certain directions about his dwelling-house, gave to his son R. his freehold land in D. (without words of limitation), and directed that the *residue of his property*, which he might leave at his death, might be divided between him and his two sisters in equal proportions, subject to the following restrictions. The testator then directed his son's portion to be *placed* in the names of trustees, and the *interest* to be paid to him (he being already tenant for life of the land.) After his death his *share* to be divided between his children, and *placed* in the names of trustees, with a power to employ the *interest* for their maintenance and part of the *capital* for their advancement; and at their age of twenty-five to *transfer* the whole to them: with certain ulterior limitations in case R. died without issue. Lord Cottenham, notwithstanding the inapplicability of the trusts to real estate, held that the reversion of the estate in D. passed by the residuary *clause, and that the trusts and limitations must be applied distributively to the real and personal estate. "In considering gifts of residue," he said, "whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifest-

[(a) 4 My. & C. 331. See also *Morrison v. Hoppe*, 4 De G. & S. 234; *Stokes v. Salomons*, 9 Hare 75; *Hunter v. Pugh*, 4 Jur. 571; *Mayor, &c., of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76, 11 Jur. 193, stated *ante* p. *726; *D'Almaine v. Mose-*

ley, 1 Drew. 629; *Fullerton v. Martin*, 22 L. J., Ch. 893, 17 Jur. 778; *Streatfield v. Cooper*, 27 Beav. 338; *Morris v. Lloyd*, 3 H. & C. 141; *Hamilton v. Buckmaster*, L. R., 3 Eq. 327; *Lloyd v. Lloyd*, L. R., 7 Eq. 458.

ing it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And, applying himself to the particular will before him, he said: "The circumstance of the testator using expressions and giving directions applicable only to the personal estate may prove that he did not at the time consider or was not aware that this fee would be part of the residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property."

Nevertheless, in *Coard v. Holderness*, (b) where a testator, after bequeathing some legacies, "gave, bequeathed and disposed of all *estate, effects and property* whatsoever and wheresoever, which he was then or should at his decease be possessed of or entitled to, or over which he had any right or power of disposition, to A, B and C, *their executors and administrators*, on trust to divide into five equal parts or shares;" and then gave directions respecting the *income* and *principal* of the respective parts or shares *or legacies*, and the *balance*, after deducting certain specified sums; and as to one share (intended for a son who was absent), he provided that he should claim it of the testator's executors, or the survivors, &c., *or other his legal personal representative* for the time being within a given period, with directions to accumulate the share in the meantime. Sir J. Romilly, M. R., admitted that the words "estate, effects and property" taken alone were sufficient to include real estate, and that it lay on the heir to show that they were cut down; but he held that this was shown by the whole context, and that only personal estate *was included. He relied on the absence of any word peculiarly applicable to real estate, as "heir," "devise," "rent," or the like; on the limitation to executors and administrators; (c) on the use of other terms, stated above, especially adapted to personal estate; and on the authority of *Doe v. Buckner*; (d) and notwithstanding Lord Cottenham's clear statement of the ground of his own decision in *Saumarez v. Saumarez*, the M. R. referred it to the preceding gift for life of the D. estate, as

Trusts applicable exclusively to personalty held to prevent realty passing.

Coard v. Holderness.

Sir J. Romilly's view of *Saumarez v. Saumarez*.

(b) 20 Beav. 147.

(c) But see per Lord Tenterden in *Doe v. Hurrell*, 5 B. & Ald. 18, *ante* p. *732.

(d) 6 T. R. 610. But of this case it was said by Sir R. Kindersley, in *Fuller-*

ton v. Martin, 22 L. J., Ch. 894, that it would be decided differently at the present day, and that the grounds of Lord Kenyon's decision would not now be sufficient to warrant such a conclusion.

showing that the testator actually intended to include the reversion in the residue.] (e)

In some cases where the words of the devise to trustees have been sufficiently ample to include real estate, but the trusts have applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

As in *Dunnage v. White*, (f) where the testator, after devising certain real estate, and bequeathing some pecuniary legacies, proceeded as follows:—"And all the rest, residue and remainder of my *estate or effects, whatsoever and wheresoever, of what nature or kind soever*, I give, devise, (g) and bequeath unto my said trustees and executors after named and appointed, upon the trusts following; that is to say, that they my said executors do and shall, as soon as may be conveniently after my decease, make sale and absolutely dispose of my *household goods and stock in trade*, by public auction, for the most money that can be *had or gotten for the same; and also do and shall, with all convenient speed, collect in all *debts* due and owing to me at the time of my decease, together with all moneys owing or belonging to me upon mortgage, bond, bill, note, specialties, simple contract, or otherwise howsoever; and when the same shall be so collected and got in, to divide the same into six parts or shares, and to *pay* the same, when so divided, in manner following; that is to say, four equal sixth parts thereof to certain persons named, and the remaining two-sixth parts thereof to

"Estate or effects" held to include land, but trusts of will confined to personalty.

Resulting trust for the heir.

(e) In support of this view of Lord Cottenham's decision the M. R. cites *Turner, V. C.*, in *Stokes v. Salomons*, 9 Hare 83, where the V. C. says that the prior gift showed that the testator had "real estate" in his mind. This is translated by the M. R. into "*that estate*." If this is the true view of *Saumarez v. Saumarez* the decision was of course: yet on another occasion the M. R. said it was a "very strong" one, 19 Beav. 224. Other judges have not agreed with the M. R. in his view of the decision. It was relied upon by *Turner, V. C.*, in *Stokes v. Salomons*, (where there was no prior gift of land or real estate); and was thus referred to by *Wood, V. C.*, *Buchanan v. Harrison*, 31 L. J., Ch. 82; "Lord Cottenham says, and I entirely follow the reasoning, that where

the testator used the word property he only meant personal estate, but he did mean to dispose of all his property whatever it was. He believed he was passing the whole of his estate, but believed it was personal property."]

(f) 1 J. & W. 583. [See also *Longley v. Longley*, L. R., 13 Eq. 133; with which cf. *Hamilton v. Buckmaster*, L. R., 3 Eq. 327.]

(g) That this word, when applied to effects alone, will not carry real estates, see *Camfield v. Gilbert*, 3 East 516; [but see *Phillips v. Beal*, 25 Beav. 25. Conversely, the word "bequeath" will not be sufficient to confine the effect of a gift otherwise capable of including real estate, *Whicker v. Hume*, 14 Beav. 518; *Gyett v. Williams*, 2 J. & H. 436.]

invest in the public stocks or funds," &c. Sir T. Plumer, M. R., held it impossible not to construe the devise as comprising the real estate; but that the testator having given both the real and personal property to the trustees, and having only said what was to be done with the personalty (for not a word of the disposition of the beneficial interest referred to real estate), the consequence was the trust of the realty resulted to the heir-at-law. (*h*)

V.—In some cases, real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration.⁶ Thus, in *Hopewell v. Ackland*, (*i*) where the testator devised as follows:—"I devise all my lands, tenements, and hereditaments to A. Item, I devise all my goods and chattels, moneys, debts, and *whatsoever else I have (in the world) (k) not before disposed of*, to the said A, he paying my debts and legacies; and make him executor." Trevor, C. J., held, that by these words an estate in fee passed; for it could not have any effect upon the personal estate, because that was given away as fully as possible by the words precedent; therefore it must extend to the remainders in the real estate.

Real estate held to pass by vague and informal words.

"Whatsoever else I have not before disposed of."

The reasoning of the C. J. deserves attention, though the point seems not to have been necessary to the construction that the devisee took a fee; for the prior devise was clearly adequate to carry all the lands, and the charge upon the devisee would enlarge his estate in those lands to a fee. (*l*)

So, in *Huxtep v. Brooman*, (*m*) the words "all I am worth" *were held to comprise land in the will of a very illiterate testator in these terms:—"This being my last will and testament, I give and bequeath to Mary, daughter of M. H., and like-

"All I am worth," held to carry land.

(*h*) It seems to have been overlooked in this case, that the freehold farm, in respect to which the question arose, had been contracted to be purchased by the testator before he made his will, but had never been conveyed to him; so that there was no legal estate in the testator upon which that part of the decision which gave the estate to the trustees could operate.

C.) 74, "all that I possess in doors and out doors."

(*i*) Salk. 239, 1 Com. 164.

(*k*) These words do not occur in Salkeld.

(*l*) See *post* ch. XXXIII.

(*m*) 1 B. C. C. 437. So, as to the words "I make A my sole heir;" *Taylor v. Webb*, Sty. 301, 307, 319; 2 Sid. 75, *ante* p. *357, n.

6. So in *Tolar v. Tolar*, 3 Hawks (N.

wise to the son and daughter of S. T., all the overplus of my money ; and likewise beg of my executor that he will pay into the hands of the above children's friends all the money that is due to me on settling my father's account. Friday : I give and bequeath to them *all I am worth*, except £20 which I give to my executor, M. T. B."

This case may be considered as exhibiting the extreme point to which the decisions have gone, in applying general informal words to real estate. Nothing could be more comprehensive or more untechnical than the expression here used. The case was cited with approbation by Gibbs, C. J., in *Doe v. Rout*, (n) [and by the Court of Exchequer in *Davenport v. Coltman*, (o) where it was said never to have been doubted. The only apparent exception is a *dictum* of Sir E. Sugden, to the effect that it might be a little difficult to support it.] (p)

In *Pitman v. Stevens*, (q) the testator devised as follows:—"I give and bequeath *all that I shall die possessed of, real and personal, of what nature and kind soever*, after my just debts are paid: I do hereby appoint P. my residuary legatee and executor:" and, in a subsequent part of his will, he desired his legatee and executor to let his sister be interred in a certain vault, and recommended him to do something handsome for the testator's brother-in-law at his death, or when he should want anything to live on: it was held that P. took a fee in the real estate.

In *Barclay v. Collett*, (r) it was held, that a devise to trustees of the residue of the testator's real and personal estate comprised a freehold messuage, not included in the specific devises of the will, though the trusts expressed were so indefinite and uncertain as to render it impossible for the trustees to act without the aid of a court of equity.

So, in *Wilce v. Wilce*, (s) where a testator commenced his will as follows:—"As touching such worldly property, wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form." He then proceeded to make several dispositions of land and goods, and concluded with the following residuary clause:—"All the *rest of my worldly goods, bills, bonds, notes, book debts and ready money, *and everything else I die possessed of*, I give to my son George, whom I make my whole and sole executor." It was held, on the authority of

(n) 7 Taunt. 81, ante p. *717.

[(o) 9 M. & Wels. 481.

(p) 1 D. & War. 439.]

(q) 15 East 505.

(r) 6 Scott 408, 4 Bing. N. C. 658.

(s) 5 M. & Pay. 682, 7 Bing. 664.

the preceding cases, especially *Smith v. Coffin*, (t) that certain real estate, not included in the specific devises, passed by this clause to the testator's son George, and that he took the fee.⁷ [Seeing what was the testator's intention, as disclosed by the preamble, the court could not but say he had employed sufficient words to carry it into effect. (u)]

And in *Evans v. Jones*, (x) where a testator appointed his wife executrix, and continued—"First, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, or *whatever I may be possessed of* at the time of my decease." It was held that the testator's real estate passed to the wife. The court (Cleasby and Pollock, BB.) observed that the words *whatever* "I may be possessed of at my decease" taken by themselves would carry the real estate, and were not to be read as the concluding portion of an enumeration of the particulars of the personal estate, but as introducing a new subject of gift. The previous words being sufficient to pass the whole personal estate, the words which followed would be inoperative unless they carried real estate.

In *Day v. Dameron*, (y) a testator gave his house M. to his wife (without words of limitation), and his house N. to his wife for life, together with his household goods, &c.; but if she married again, (which she did not do,) "the above property was to become the property" of his daughter for life, remainder to her children: but if his wife remained unmarried, then, after her death, he gave house N. to the daughter for her life and her children. The testator then went on: "I appoint my wife sole executrix and residuary legatee to all other property I may possess at my decease."
 * * * Now concerning my funded property, I hereby" give one moiety to the wife and the other to the daughter. Sir L. Shadwell held that the wife, under the residuary clause, took the remainder in house M. He thought it clear, that this clause did not refer to personal property; for *the testator almost immediately afterwards spoke of his funded property in a distinct sentence.

"I appoint my wife executrix and residuary legatee to all other property I may possess at my decease."

In *Davenport v. Coltman*, (z) a testator, after certain pecuniary

(t) *Ante* p. *725.

7. *Pruden v. Paxton*, 79 N. C. 446.

[(u) But as to its carrying the fee, see ch. XXXIII.]

(x) 46 L. J., Ex. 280. See also *Warner*

v. Warner, 15 Jur. 141; *Phillips v. Beal*, 25 Beav. 25.

(y) 12 Sim. 200; *Warren v. Newton*, Dru. 464.

(z) 9 M. & Wels. 481, 12 Sim. 588.]

legacies, bequeathed to his wife for her life his freehold house at C., together with the use of plate, &c., and of interest of stock; and declared that, "at her decease it was his will that A and B should divide equally between them, *as residuary legatees, whatever he might die possessed of*, except what was already mentioned in favor of others." And after appointing executors, he authorized them to sell certain leaseholds immediately; "but the house at C. must not be sold as long as my wife lives." On a case from chancery, the Court of Exchequer certified their opinion that A and B were entitled in fee simple to the whole real estate of the testator at the death of the wife, subject, as to the house at C., to the wife's life estate.⁸ They relied partly on the generality of the expression, "whatever I may die possessed of," which they thought was not to be limited to personal estate, being, in their opinion, equivalent to "all I am worth," (a) or "all I have;" (b) but they also relied on the direction to postpone the sale of the house at C., which could only refer to a sale for convenience of division between A and B according to the terms of the residuary clause, and that, if any real property was included in that clause, all must be so. Sir L. Shadwell, V. C., confirmed the certificate; observing that besides the terms "whatever I shall die possessed of" (which he thought would comprehend estates in fee simple), there was an exception of "what was already mentioned in favor of others," and that one of the things already mentioned was the possession of the freehold house for the life of the wife.]

On the other hand, in *Monk v. Mawdsley*, (c) where a testatrix, in a will made under a power, after bequeathing several pecuniary legacies, proceeded thus:—"I give, devise and bequeath to my husband P. M. my two fields and house in the township of Great Neston, likewise the remainder of my personalty, *and all I may die possessed of at the time of my death*, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving this my last will and testament. I nominate and appoint A. K., and my husband P. M., trustees and executors of this my last will and testament." Sir J. Leach, V. C., held that the fee

8. *Smith v. Smith*, 17 Gratt. 268; *Burke v. Chamberlain*, 22 Md. 298.

(a) *Huxtep v. Brooman*, 1 B. C. C. 437.

[(b) See per Bayley, J., *Doe v. Morgan*,

6 B. & Cr. 518, 9 D. & Ry. 633.]

(c) 1 Sim. 286. [Compare remarks by

the same judge upon the word "possessed" in *Noel v. Hoy*, and *Thomas v. Phelps*, ante p. *730. The concluding distinction between real and personal estate is removed by 1 Vict., c. 26, § 3.

in the Neston estate did not pass by these words. The argument for the husband, he observed, was, that these words would have no effect, unless they operated to carry the fee of the Neston estate, the whole personalty passing by the prior expression; but he knew of no case in which words had been held to carry a fee simple, because they would otherwise be mere surplusage and repetition. He relied much on the words "possessed of," as being applicable exclusively to personal estate, especially when coupled with the words "at the time of my decease," which could not refer to real estate. (d)

So, in *Henderson v. Farbridge*, (e) it was contended, that the equity of redemption in a copyhold estate passed under the following words, in a letter from the deceased (who was abroad in a military capacity) to his mother. After giving some directions respecting the rents of the property in question, he said, "Provided I should die, or be slain in the wars, or by any other means before my return, I give and bequeath *all my effects* (after paying of every due demand) to you for life, and then to go to my younger sister Ann." In another letter to his mother, he made very affectionate mention of his sister Ann, and added these words: "If anything should happen to me in this country, *what little I have left to call my own* may be useful to her." Lord Gifford, M. R., was of opinion that, treating these papers as testamentary, the words were inadequate to pass property of the nature of real estate.

[In *Maitland v. Adair*, (f) a testator devised his estate at T. to his nephew A, and bequeathed money legacies to several other relations; and by a codicil directed his undisposed-of money to be divided among his said relations in the proportion he had *bequeathed* (g) the other part of his *fortune*; Lord Rosslyn held that the word "fortune" must mean money legacies, and

(d) Followed in *Cook v. Jaggard*, L. R., 1 Ex. 125, though there the words were "or whatever I may be possessed of or entitled to." The court distinguished the case from *Wilce v. Wilce*, *sup.*, by reason of the words being "or whatever" instead of "and whatever:" *sed qu.*, and see *Evans v. Jones*, *sup.* As to another distinction suggested by Channell, B., during the argument, it is to be observed that a devisee for life of specific lands has frequently been held to take the remainder in fee of the same lands under informal

words in a subsequent residuary clause. See *Hopewell v. Ackland*, *ante* p. *738; and the following cases where the residuary devise contained the word "estate" or "property:" *Scott v. Alberry*, *ante* p. *722; *Roe v. Gilbert*, *ante* p. *725; *Day v. Daveron*, *ante* p. *740; *Saumarez v. Saumarez*, *ante* p. *735.]

(e) 1 Russ. 479.

[(f) 3 Ves. 231.

(g) As to this word, *vide ante* p. *737, n. (g).]

"All my effects."

"What little I have to call my own."

"My fortune" confined to personalty by context.

that A was not entitled to a share in respect of the value of the T. estate.]⁹

*VI.—It remains to be observed, that words applicable exclusively to personal estate have sometimes, by force of the context, been held to include land.¹⁰ This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.

Thus, in *Hope d. Brown v. Taylor*, (*h*) where a testator, after devising certain lands to A, B and C, and giving pecuniary legacies to B and C, provided that, if either of the persons before named died without issue, then *the said legacy* should be divided equally between them that were alive: it was held that the word “legacy” in this clause extended to the land before devised. Foster, J., observed that one of the persons named had no pecuniary legacy.

So, in *Hardacre v. Nash*, (*i*) where a testator, after bequeathing two legacies of £150 each to his son and daughter, gave all his real and personal estate to his wife for life, and at her death a copyhold and freehold estate to his son, and a copyhold messuage to the daughter; adding, “but if either or both of my children should die before the decease of my wife, then *those legacies* which are here left them shall return unto my wife for her sole use and benefit, and for her to dispose of freely as she might think fit.” It was contended that the word *legacies* here referred to pecuniary legacies, and those only; but the Court of K. B. held that it extended to the real estate devised to the children; and, consequently, that on the death of the son in the lifetime of the widow she became entitled to the property given to him.

[So, the words “residuary legatee,” though properly applicable to

9. So “all the residue of my estate” may be restricted to personally by the context, *McChesney v. Bruce*, 1 Md. 344. See also *Buist v. Dawes*, 3 Rich. 281.

10. *Smith v. Smith*, 17 Gratt. 268.

(*h*) 1 Burr. 268.

(*i*) 5 T. R. 716; [see also *Brady v. Cubitt*, Dougl. 31, 40.] As to the words “share,” “share aforesaid,” “portion,”

and similar expressions, as applying to one or more of several preceding subjects, *vide Doe d. Stopford v. Stopford*, 5 East 501; *Hardman v. Johnson*, 3 Mer. 348; *Doe d. Gibson v. Gell*, 2 B. & Cr. 680, 4 D. & Ry. 387; *Doe d. Driver v. Bowling*, 5 B. & Ald. 722; [*Scrivener v. Smith*, 2 D., M. & G. 399.

personalty only, (*k*) are sufficient to designate the person who is to take the realty if the context shows an intention so to use them; as in *Hughes v. Pritchard*, (*l*) where a testator began *thus: "As to my estate which God has bestowed on me, I do make this my last will and testament as follows (that is to say):" he then devised certain freehold land to A for life with remainder over, and another freehold farm to B for life with other remainders over; next he gave pecuniary legacies, then a specific legacy, and afterwards more pecuniary legacies, "and I make A, C and D my residuary legatees." It was held by Jessel, M. R., and James and Bramwell, L. JJ., that the testator's real estate not specifically devised passed to A, C and D. Sir G. Jessel agreed that an appointment of residuary legatees standing alone in a will would be a gift of the personal estate only; but he said, "Looking at the preliminary words, the testator, as it seems to me, has told us in express terms that he has disposed by his will of all his property. That being so, and finding in the will a disposition of parts of his property with that appointment of residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, and that he intended those three persons to take the residue of his property?" Sir W. James asked, during the argument, whether there was any case where such words as "I appoint, &c." had been held not to pass real estate, if there had been previous gifts of real estate in the will.]

"I appoint A residuary legatee," held to carry real estate.

Upon the principle already stated, the word *effects* (though applicable strictly to personalty only) (*m*) has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate.

As in *Doe d. Chillcott v. White*, (*n*) where a testator after making

(*k*) *Doe d. Roberts v. Roberts*, 7 M. & Wels. 382; *Lea v. Grundy*, 1 Jur. (N. S.) 953; *Windus v. Windus*, 21 Beav. 373, aff. 6 D., M. & G. 549, *diss.* K. Bruce, L. J.

(*l*) 6 Ch. D. 24. See also *Pitman v. Stevens*, *ante* p. *739; *Alleyne v. Alleyne*, 2 Jo. & Lat. 544, per Sugden, C.; *Evans v. Crosbie*, 15 Sim. 600. And see *Singleton v. Tomlinson*, 3 App. Cas. 404, stated *ante* p. *628; *Wildes v. Davies*, 1 Sm. &

Gif. 475; in each of which the surplus proceeds of converted realty were held on the context to pass to persons appointed "residuary legatees."]

(*m*) *Camfield v. Gilbert*, 3 East 516; *Doe d. Hick v. Dring*, 2 M. & Sel. 448; [*Doe d. Haw v. Earles*, 15 M. & Wels. 450; but see per Malins, V. C., *Smyth v. Smyth*, 8 Ch. D. 561.]

(*n*) 1 East 33.

"Said effects," several pecuniary bequests, devised to A. the income of a certain cottage, and to E. the half of a certain estate; and all the residue of his goods, chattels, rights, credits, personal and testamentary estate, and also his lands, tenements and hereditaments, he gave to his wife for life, whom he made sole executrix; and he allowed her to give what she thought proper of "*her said effects*" to her sisters, the said A. and E., for their lives; and, after the above lives were expired, he gave all his lands to J., who was his heir-at-law: it was held that the power of the widow extended to all the real and personal estate given to her for life, including the cottage in which A. had a life interest.

*So, in *Marquess of Titchfield v. Horncastle*, (o) where the testator directed all his debts and funeral and testamentary expenses to be paid; and bequeathed all his furniture and goods, linen, plate and books to his brother J. He gave to Ruth Chambers an annuity payable out of his real and personal estate, adding "and this my executors hereinafter named will contrive." Then after giving several legacies, he gave and bequeathed all the residue of his goods and chattels, personal estate, *effects of what nature and kind soever*, (p) to trustees, directing them to take an inventory of all his goods and chattels, of whatsoever nature they might be; but not to dispose of nor sell any part, not even the books, until the death of his brother, then the whole of the effects, &c., to be sold, and the money arising therefrom to be considered the property of the noble person thereafter bequeathed to. And the testator further directed that no part of the real property he had in houses, land, &c., should be disposed of at the time of his decease. And then (after many intervening directions concerning his personal estate) he declared his determination, that his brother should have the whole of the profits arising from his estates, as rents, interest, dividends, as they arose, for his maintenance, subject to the control and management of his trustees, and that he should have the entire use of his furniture, in short everything; adding "And I further will and direct, that my said trustees, on the demise of my brother, shall stand seized and possessed of such moneys *and effects*, upon trust to pay the same to the noble Marquess of Titchfield to his own entire use; [and as I have no relations that I know of entitled to a single sixpence from me, unless Mrs. M., my brother's

(o) 2 Jur. 610. [See also *Milsome v. Long*, 3 Jur. (N. S.) 1073; *Phillips v. Beal*, 25 Beav. 25.] (p) But as to these words following the word "effects," see *Doe v. Dring*, 2 M. & Sel. 454.]

widow, and she has ample provision from the family, I trust that his lordship will not therefore hesitate in accepting the *property* which may remain after my brother's demise." Lord Langdale, M. R., held, that the testator's real estate passed under this clause. Criticism on the word "effects." "Much has been said in argument," he said, "as to the meaning of the word 'effects,' which was understood by Lord Mansfield to mean much the same thing as worldly substance, although certainly in subsequent cases the courts have inclined to consider that word in its proper or natural interpretation to be confined to personal estate, unless there are other words in the context to control that meaning; I do not express any opinion *on that, although *I am not aware of any reason why the word should not be applicable to the 'effects' generally arising from a man's industry, whether consisting of personal or of real estate*; but it is not now necessary to express an opinion on so refined a point of construction. The testator intended that his debts should be paid; and after that was done, that his brother should enjoy what remained of his real and personal property for his life, and after his brother's death, he did not intend any relation to have any part of his property, but he did intend that his property should go to the plaintiff. He subjected the whole of his property to the payment of debts. Then the annuity given to Ruth Chambers was to be paid out of his real and personal estate, which his executors were to contrive. His executors were to contrive the mode of payment of the annuity out of the real and personal estate. They were, therefore, to have some estate or power to enable them to do that. The testator, afterwards, it appears to me, gives directions as to the whole of the property which was producing income. He gives directions as to his real property. Nothing was to be sold during the life of his brother. His property was realized—perhaps it might be right to say 'effected'—at the time of his death, and he meant it to remain so until his brother's death. Taking the whole of the will together, it does appear to me that the testator has given all his real and personal estate to the trustees, for the benefit of his brother, during his life, and has directed that, at his death, all shall be converted into money, and paid to the plaintiff." [The M. R. then read the concluding passage in the will, and added, "These words might be said to mean the property before mentioned; but it is the property 'remaining after my brother's decease;' and though it is not necessary to attach to this sentence the effect of a new devise, it certainly explains what was before given."]

So, in *Den d. Franklin v. Trout*, (*q*) where the devise was to *E. of "all my estate and effects whatsoever and wheresoever, which I shall

Force of some referential expressions.—(*q*) 15 East 394. As to the effect of some referential expressions of frequent occurrence,—“as aforesaid,” see [*Walsh v. Peterson*, 3 Atk. 194; *Davis v. Norton*, 2 P. W. 390;] *Weddell v. Munday*, 6 Ves. 341; *Sibley v. Perry*, 7 Ves. 522; *Meredith v. Meredith*, 10 East 503; “as before,” *Macnamara v. Lord Whitworth*, Coop. 241; “in like manner,” [per *Levinz, J.*, 1 Mod. 100;] *Roe d. Aistrop v. Aistrop*, 2 Bl. 1228; [*Doughty v. Saltwell*, 15 Sim. 640; *Lewis v. Puxley*, 16 M. & Wels. 733; *Davies v. Hopkins*, 2 Beav. 276; *Tyndale v. Wilkinson*, 23 Beav. 74; “in manner aforesaid,” Co. Lit. 20 (*b*); *Doe d. Woodall v. Woodall*, 3 C. B. 349; *Milsom v. Awdry*, 5 Ves. 465; *Lumley v. Robbins*, 10 Hare 621; *Bessant v. Noble*, 26 L. J., Ch. 236; *Mountain v. Young*, 18 Jur. 769;] “on the same terms or conditions,” *Goodtitle d. Cross v. Woodhull*, Willes 592; *Longdon v. Simpson*, 12 Ves. 295; [“subject to the same restrictions,” *Barber v. Barber*, 1 Jur. 915; *Ross v. Ross*, 2 Coll. 269;] and other expressions of reference to some antecedent clause or provision; [Co. Lit. 9 (*b*);] *Shanley v. Baker*, 4 Ves. 732; *Roe d. Wren v. Clayton*, 6 East 628; see also *Younge v. Coombe*, 4 Ves. 101; [*Dillon v. Harris*, 4 Bli. (N. S.) 329; In re *Kendall*, 14 Beav. 608; *Shawe v. Cunliffe*, 4 B. C. C. 144; *Doe v. Maxey*, 12 East 589. It is to be collected from the cases that where the gift is absolute such referential expressions determine generally not *who* shall take a legacy, but *how* the legatees shall take. Where, for instance, a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and there follows a gift to the children of A, “in the same manner,” all children of A take whether living at that time or not. See *Yardley v. Yardley*, 26 Beav. 38; *Pigott v. Wilder*,

Id. 90; *Wilder's Trusts*, 27 Beav. 418; *Archer v. Legg*, 31 Beav. 187: otherwise, if the words be “at the same time and in the same manner,” *Swift v. Swift*, 32 L. J., Ch. 479. On the other hand when the principal gift is to A for life, with remainder, another gift to A, or to B, or to the remainderman, “in the same manner” (or the like) will generally import the same (or corresponding) limitations and remainders, *Davies v. Hopkins*, 2 Beav. 276; In re *Colthead's Will*, 2 De G. & J. 690; In re *Palmer*, 3 H. & N. 26; *Sweeting v. Prideaux*, 2 Ch. D. 413; *Minton v. Kirwood*, L. R., 3 Ch. 614, (where “same uses” were held to include powers to appoint uses); *Heasman v. Pearse*, L. R., 11 Eq. 522; *Giles v. Melsom*, L. R., 6 C. P. 532, 6 H. L. 24, (“so specifically devised.”) And gifts in settlement to several stocks, the first fully expressed, with ulterior trust for the other stocks, and the other gifts being “on like and corresponding trusts,” were read *mutatis mutandis*, *Surtees v. Hopkinson*, L. R., 4 Eq. 98. In *Ord v. Ord*, L. R., 2 Eq. 393, a devise to A “on the same conditions as he holds” Blackacre, was held to refer to conditions in A's marriage settlement (though not referred to) there being no others. If lands be devised to the same uses and trusts, and with the same powers, &c., as other lands already settled, the powers will be exercisable by the trustees of the settlement not of the will, *Taylor v. Miles*, 28 Beav. 411. In *Auldjo v. Wallace*, 31 Beav. 193, a bequest of “£200 a year to be invested in the same manner as” a sum of consols previously given was held to mean a fund producing that income. In *Murton v. Markby*, 18 Beav. 196, a bequest of leaseholds upon the same trusts, &c., as those declared of the *moneys to arise* by sale of property previously given upon trust for sale was held to subject the leaseholds to the trust for sale

be possessed of or entitled to at the time of my decease," in trust to pay funeral expenses and debts. The testator then subjected his "*said effects bequeathed to E.* to the following legacies," and went on to enumerate certain pecuniary legacies, and gave to S. a house in W. He directed that all the above legacies should be paid out of his effects by the said E. within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his *said effects* to the said E., her heirs and assigns, forever. It was held, that she took the remainder in fee in the house devised to S., (which was the testator's only real property,) by this devise. Lord Ellenborough relied much on the testator's having included the house among the enumerated legacies, by which he had explained himself to describe that property under the denomination of "effects" and "legacies."

"Said effects bequeathed to E.," referred to land before devised.

[Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context. Thus, in *Wright v. Shelton*, (r) where a testator gave *to trustees "all his *worldly goods* of what nature and kind soever and wheresoever they might be found upon the trusts undermentioned; his wife to have possession while she lived, but if she married, to quit possession: all his debts and legacies to be paid out of his personal estate and W. close. To his son A £20 and H. close: to his children B, C and D the rest of his *worldly goods*:" it was held by Sir W. P. Wood, V. C., that the real estate was included in the gift of "worldly goods." "If," he said, "we were to turn 'worldly goods' into 'personal estate,' it would not make the sentence read better. The second 'all' must refer to the same property as the first—viz. all that was given to the trustees, which certainly includes some premises to be quitted. There were no leaseholds. If the premises are to be included in that word 'all,' then the 'all' here referred to must correspond with 'all the worldly goods' given to the other parties."

"Worldly goods," held on the context to pass real estate.

Even the expression "personal estates" (s) will carry realty if the testator has clearly shown his intention that it shall do so. As in *Doe d. Tofield v. Tofield*, (t) where,

"Personal estates," held sufficient upon the context to pass realty.

(r) 18 Jur. 445.

(s) In "personal estate and property" or "personal property, estate and effects" the word "personal" will generally override the whole, *Buchanan v. Harrison*, 31

L. J., Ch. 74, 8 Jur. (N.S.) 965; *Belaney v. Belaney*, L. R., 2 Eq. 210, 2 Ch. 138; *Jones v. Robinson*, 3 C. P. D. 344.

(t) 11 East 246. See also *Cadman v. Cadman*, L. R., 13 Eq. 470.]

after some pecuniary bequests and a particular devise of realty, the testator proceeded to give to his wife "all his stock, &c., ready money, &c., and *personal estates* whatsoever and wheresoever, subject nevertheless to the above legacies," during widowhood: but if she married she was to resign "all his *personal estates* to the after-mentioned legatees in manner following: first, he gave and bequeathed to J. the house and premises in which he the testator then dwelt, with the closes adjoining," to hold in fee; "and the remaining of his *personal estates*" to other persons in fee. The Court of K. B. were clearly of opinion that the wife took the real estates for her life.]

The preceding cases, in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

But in *Roe d. Walker v. Walker*, (u) a testator devised to his wife "Said house, goods and chattels," a certain house, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life; and if his (omitting the word lands before used,) did not pass lands. aforesaid wife should die before his sons H. and R. came to the age of fifteen, *then that his *house, lands, goods and chattels*, that is to say, the rents arising from the same, should be employed in bringing them up, until the age of fifteen. The testator then declared his will to be, that his aforesaid *house, goods and chattels*, equally should be divided between all his sons and daughters that should be living at that time, share and share alike. It was held, that under the last devise, the lands did not pass.

It will be observed that in *Doe d. Chilcott v. White* and in *Den d. Franklin v. Trout* the word "effects" was used as synonymous with, and descriptive of the same subject as, the anterior expressions, which unquestionably comprised real estate; but in *Roe v. Walker* the testator had in the third devise adopted precisely the same phraseology as in the first and second, with the omission of a single word, and that word the only one which applied to the land. It was too much, therefore, to infer that these words, with so material an omission, were intended to describe the same subject as the preceding expressions, however reasonable might be the conjecture that the omission was undesigned. If the testator in the third gift had used terms of description not exactly corresponding,

Remark on
Doe v. White,
Den v. Trout,
and *Roe v.*
Walker.

(u) 3 B. & P. 375. [Cf. *Lethbridge v. Kirkman*, 25 L. J., Q. B. 89, 2 Jur. (N. S.) 372.

so far as they went, with those of the preceding devises, the difficulty of adopting this construction might not have been so insuperable. It would not then have imposed upon the court the necessity of treating the same words in the several gifts as descriptive of a different subject.

[But though a devise in terms properly and *prima facie* applicable to personalty only may thus embrace real estate where the context refers to, or otherwise speaks of the subject, or any part of the subject of the devise, in terms applicable exclusively to real estate; yet no such incontestable argument arises where the context contains words, which, though they properly comprehend real estate if a contrary intention is not shown by the will (*e. g.* property, estate), are nevertheless flexible and liable to be influenced by more precise terms of description. Thus, in *Doe d. Haw v. Earles*, (x) where one devised as follows: "I dispose of all my *effects* as follows:—all my household goods, live stock, furniture, plate, wearing apparel and other *effects* at this time in my possession, or that hereafter may become my *property*, to my wife:" and a second husband was to have no power of disposition over "any part of the property which was then or might thereafter be in his (the testator's) possession." Platt, B., *admitting that the word "effects" alone could not include real estate, was induced by the context to think the testator had here used "effects" as synonymous with the word "property," and that real estate passed. But Pollock, C. B. and Parke, B., were of opinion that there was nothing in the will to extend the natural meaning of the word "effects," which they held meant personal things only. "He disposes of all his effects," said Parke, B., "*as follows*:—The words 'all my household goods, &c., and other effects now or hereafter to become my property,' carry the case no further; only such effects as are or may be his property pass." And the provision that the second husband should have no power of disposition over the property meant only, he thought, that whatever property was left to the wife should be for her separate use. "The property means only the property before devised, that is, effects merely."]

Words properly descriptive of personalty only, not extended to realty by ambiguous expressions.

(x) 15 M. & Wels. 450. And see *Barnaby v. Tassell*, L. R., 11 Eq. 363.]

* CHAPTER XXIII.

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.

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| <i>Extent of words "Goods," "Chattels," "Effects," "Things"—Restrictive effect of Association with more limited Terms—</i> | <i>Residuary Bequest—General Residue held to pass by word "Money," and other informal words.</i> |
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The word *effects*, (a) and even the word *goods*, (b) or *chattels*, (c) will, it seems, comprise the entire personal estate of a testator, unless restrained by the context within narrower limits.¹ Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles *ejusdem generis*;

Word
"effects,"
"goods," or
"chattels,"
whether it
comprises en-
tire personal
estate.

[(a) Cowp. 299, 15 Ves. 507.]

(b) See *Portman v. Willis*, Cro. El. 386, where it was held that leaseholds passed under a bequest of "the residue of my goods." See also *Anon.*, 1 P. W. 267.

(c) Co. Lit. 118, (a); [*Tilley v. Simpson*, 2 T. R. 659, n., per Lord Hardwicke. In *Gower v. Gower*, Amb. 612, 2 Ed. 201, running horses were held to pass as "goods and chattels."]

1. See *Wms. Ex'rs* (6th Am. ed.) 1272; *Hawkins on Wills* 48; 1 *Rop. on Leg.* 248; 2 *Redf. on Wills* 101; *Ferguson v. Zepp*, 4 Wash. C. C. 645. "Property" will include only personalty, if that intention be clear, *Wheeler v. Dunlap*, 13 B. Mon. 291; so "all my earthly property," *Brown v. Dysinger*, 1 *Rawle* 408; "property" will also include *money and securities*, *Pell v. Ball*, *Speers Ch.* 48; *Hurdle v. Outlaw*, 2 *Jones Eq.* 75; *Stuckey v. Stuckey*, 1 *Hill Ch.* (S. C.) 308; and *choses in action*, *McLemore v. Blocker*, 2 *Harp. Ch.* 272; *Hurdle v. Outlaw*, *ubi supra*; (but *contra*, *Jamesson App'l't*, 1 *Mich.* 99,) and *stocks and bonds*, *Hurdle v. Out-*

law, *ubi supra*; *Adams v. Jones*, 6 *Jones Eq.* 221; but in an enumeration of furniture, apparel, &c., it is often restricted to chattels *ejusdem generis*, *Dole v. Johnson*, 3 *Allen* 364; *Browne v. Cogswell*, 5 *Allen* 556; and a legacy of \$500 "in such personal property as A may select" is a specific gift, *Wallace v. Wallace*, 23 *N. H.* 149.

"Estate" may be restricted in meaning to personal property—thus a gift of all the residue of "my estate, in case it shall more than suffice to pay the legacies," *Havens v. Havens*, 1 *Sandf. Ch.* 324; or "all the residue of my furniture and estate," *Bullard v. Goffe*, 20 *Pick.* 252; and a gift of all testator's estate real and personal, "except what shall be mentioned hereafter," will include property casually mentioned afterwards but not given, *Maupin v. Goodloe*, 6 *Mon.* 399.

Of other general words, a gift of "everything" except mules and money will pass choses in action, *Shelby v. Shelby*, 6 *Dana* 60; *contra*, *Young v. Young*, 3 *Jones Eq.* 216; "whatever of my property shall remain after payment" of a lapsed legacy, will carry

the specified effects being considered as denoting the species of property, which the larger term was intended to comprise; and this upon a principle, evidently analogous to that on which (as we have seen) the words "estate" and "property" have been confined to personality by their juxtaposition with words descriptive of that species of property.

the lapsed legacy, *Tindall v. Tindall*, 9 C. E. Gr. (N. J.) 512, (reversing 8 C. E. Gr. (N. J.) 244); "furniture, money in bank, all claims and demands of whatever nature," will not pass bank or other stock, *Delamater's Estate*, 1 Whart. 362; "all my crop, stock of every kind, plantation tools and carriages, implements for tanning and currying," will pass a quantity of finished leather in the tanning establishment, *Cameron v. Com'rs of Raleigh*, 1 Ired. Eq. 436. As to the meaning of "movables," see *Sneed v. Ewing*, 5 J. J. Marsh. 460; "movables" will not include a *judgment*, *Strong v. White*, 19 Conn. 238; nor a *debt*, *Jackson v. Vanderspeigle*, 2 Dall. 142; *Wood v. George*, 6 Dana 343; but will include *bonds*, *Jackson v. Robinson*, 1 Yeates 101; *Wood v. George*, *ubi supra*; and *money*, *Wood v. George*, *ubi supra*; while in *Penniman v. French*, 17 Pick. 404, "in-door movables and out-door movables" were held not to include a *promissory note*.

"Moneys" or "money" will include all personal property, if that be the clear intention of the testator, *Smith v. Davis*, 1 Grant (Pa.) 158; *Paul v. Ball*, 31 Tex. 10; *Morton v. Perry*, 1 Metc. 446; but unless such intention be evident, it will be restricted to money in possession and in bank, *Beck v. McGillis*, 9 Barb. 35; *Mann v. Mann*, 14 Johns. 9; *Beatty v. Lalor*, 2 McCarter 108; and it may include *bank stock*, *notes and bonds*, *Fulkerson v. Chitty*, 4 Jones Eq. 244; and "all surplus money possessed by me at my death," is restricted to *money* only, and will not pass the residue of the personal estate to that legatee, *Paup v. Sylvester*, 22 Iowa 371. "Money in hand" will, however, include that in the hands of an agent, *Copia's Estate*, 5

Phila. 214; and also that on deposit in a savings bank, *Dabney v. Cottrell*, 9 Gratt. 572; and "money due or to become due," will include proceeds of the testator's mother's estate sold before the execution of the will, *Newbold v. Prickett*, 2 Whart. 46.

"Household furniture" will include beds, &c., used for a boarding school, *Hooper's Estate*, 1 Brewst. 462; and everything about the house that has usually been held and enjoyed therewith, *Carnagy v. Woodcock*, 2 Munf. 234; also bronzes, statuary and pictures, *Richardson v. Hall*, 124 Mass. 228; *Dayton v. Tillou*, 1 Rob. (N. Y.) 21; and these will also be included in "books, furniture, &c.," *Tefft v. Tillinghast*, 7 R. I. 434; and plate will be included in "household goods and furniture," *Bunn v. Winthrop*, 1 Johns. Ch. 329; so, too, hay in a barn on the premises, *Dennett v. Hopkinson*, 63 Me. 350. And a gift of "all my apparel, linen, silver and jewelry now contained in eight trunks," will include jewelry in a ninth valise, *McCoy v. Vulte*, 30 How. Pr. 265; but a watch which had been ordinarily worn by testator will not pass by a bequest of "wearing apparel" or "household furniture," *Gooch v. Gooch*, 33 Me. 535; nor will a gift of a "chest of drawers" include money in the drawers, *Smith v. Jewett*, 40 N. H. 513; but a gift of "a desk, with all in it," will pass all in such desk at the time of testator's death, whether put there before or after the execution of the will, *Richmond v. Vanhook*, 3 Ired. Eq. 581. "Provisions" includes liquors, *Mooney v. Evans*, 6 Ired. Eq. 363. "All my farming utensils" will include a wagon and tools, *Plott v. Moody*, Winst. Eq., part 2, 91; so "all my household and kitchen furniture, and

As in *Cook v. Oakley*, (*d*) where the testator (who was a sailor on ship-board) gave to his mother if alive his gold rings, buttons and chest of clothes, and to his loving friend F. (a ship-mate), his red box, arrack *and all things not before bequeathed*, and made him sole executor. Sir J. Trevor, M. R., held, that the testator's share in a leasehold estate did not pass by these words.

The circumstance of a specific or pecuniary legacy being given to the same legatee, (*e*) or of the general bequest being followed *by dispositions of particular portions of the personal property to other persons, has commonly been considered to favor the supposition, that such bequest was not to comprise the general residue.

all my stock of different kinds," *Howze v. Howze*, 19 Tex. 553; and "all my personal stock of hogs" has been held to include those of a son who had died intestate, which were in testator's possession without administration, *Plott v. Moody*, *ubi supra*; and the expression "*wheat and corn on hand*" signifies that in the granaries of testator, and will not include the ungathered or standing crop, *Adams v. Jones*, 6 Jones Eq. 221; and a devise of a farm, "and all stock on the same," will not carry plantation tools or the gathered crop, *Graham v. Davidson*, 2 Dev. & Bat. Eq. 155.

"Books and papers of every description" include promissory notes, *Perkins v. Mathes*, 49 N. H. 107; *Mathes v. Smart*, 51 N. H. 438. "All my accounts" will not include a deposit in savings bank, *Gale v. Drake*, 51 N. H. 78, but "all my personal property of whatever kind, except my notes, bonds and accounts," will, *Ib*. "Rents in arrears," on the A property, will include rents unpaid and rents collected, *Wadsworth v. Ruggles*, 6 Pick. 63. "All my notes" will include bonds, but not judgments on the notes, *Perry v. Maxwell*, 2 Dev. Eq. 487; and a gift of a note will carry with it interest due on it, *Ib*. "Stock" will include stock only partly paid for, *Emery v. Wason*, 107 Mass. 507; or in a bank misnamed but evidently in-

tended, *R. C. Orph. Asy. v. Emmons*, 3 Bradf. 144; but not the increase of profits acquired after testator's death, *Dorsey v. Dorsey*, 4 Harr. & McH. 231; nor dividends due at death of testator, *Perry v. Maxwell*, 2 Dev. Eq. 487; but will not pass under the words "money in bank, claims and demands," *Delamater's Estate*, 1 Whart. 362.

But "all my property, *consisting of*," carries only enumerated objects, *Fraser v. Alexander*, 2 Dev. Eq. 348.

In general a gift of "income" or "interest" carries the principal, *Garret v. Rex*, 6 Watts 14; *Van Rensselaer v. Dunkin*, 24 Penna. St. 252; *Craft v. Snook*, 2 Beas. 121; *Mason v. Trustees*, 12 C. E. Gr. 47; *Earl v. Grim*, 1 Johns. Ch. 494; *Peale v. White*, 7 La. Ann. 449; *Andrews v. Boyd*, 5 Me. 199; *Stone v. North*, 41 Id. 265; *Willard's Appeal*, 87 Penna. St. 457; *Appeal of Penna. Co.*, 83 Id. 312; *Theobald on Wills* 243. But not where there is a gift of the principal over, *Read v. Head*, 6 Allen 174; *Saunderson v. Stearns*, 6 Mass. 37; *Barnes v. Kirkland*, 8 Gray 512; *Bentley v. Kauffman*, 86 Penna. St. 99; nor where the intention is plainly different, *Parker v. Moore*, 10 C. E. Gr. 228; *Dorr v. Wainwright*, 13 Pick. 328; *Giddings v. Seward*, 16 N. Y. 365; *Hall v. Cushing*, 9 Pick. 395; *Claggett v. Hardy*, 3 N. H. 148; *Parker's Appeal*, 61 Penna. St. 478.

Thus, in *Rawlings v. Jennings*, (*f*) where the testator gave to his wife certain bank stock, together with all his "household furniture and effects, of what nature or kind soever," that he might be possessed of at the time of his decease; and then bequeathed certain stock and money legacies to other persons, Sir W. Grant, M. R., held, that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue; observing, that part of the property being given to her afterwards, (*g*) the word "effects" must receive a more limited interpretation.

Word "effects" restrained by subsequent bequest to same person.

The words here were very general, but the manner in which the testator, after making the bequest in question, had gone on to give specific and pecuniary legacies, (though he did not complete the disposition of his personal estate by a residuary clause,) seemed hardly reconcilable with the supposition, that the prior gift to the wife was intended to embrace the general residue, as it is more natural, though certainly not invariable, for a testator to reserve his residuary disposition until the end of his will. (*h*) Had the decision rested solely on the bequest of the bank stock to the wife, its soundness would have been questionable; for the argument, that the express gift of part shows that a legatee is not to take the remainder, admits of this answer, that the testator may have intended to place him in the favored position of a specific legatee *pro tanto*. (*i*)

Remark on *Rawlings v. Jennings*.

[Again, in *Wrench v. Jutting*, (*k*) where a testator bequeathed "all his household furniture, plate, linen, china, books, pictures *and all other goods of whatever kind to A," and then proceeded to direct that certain specified particulars

Word "goods" restrained by subsequent gifts.

(*f*) 13 Ves. 39.

(*g*) But, according to the statement of the will in the report, the only other bequest to the wife is of the bank stock, which is *anterior*. [In *Parker v. Marchant*, 1 Y. & C. C. C. 304, K. Bruce, V. C., observed upon this case, that perhaps the word "household" belonged to the word "effects" as much as to the word "furniture;" which would of course have a restrictive effect, *Marshall v. Bentley*, 1 Jur. (N. S.) 260; *Newman v. Newman*, 26 Beav. 220; and compare *Michell v. Michell*, stated *post*.

(*h*) See 1 Russ. 149; [1 Y. & C. C. C. 301.]

(*i*) And, accordingly, see *Leighton v. Bailie*, 3 My. & K. 267, *post*; [*Hearne v. Wigginton*, 6 Mad. 119, *post*; *Brooke v. Turner*, 7 Sim. 671; *Rose v. Rose*, 17 Ves. 351.]

(*k*) 3 Beav. 521. In *Collier v. Squire*, 3 Russ. 467, it was held that stock did not pass under a bequest of the testator's house, with all his household furniture, plate, china, books, linen and every other article belonging to him, both in and out of his house, and which might not be in his will mentioned; the M. R. remarking that the testator could scarcely say of stock that it *might* not be mentioned or included in the articles specified.

of his property should be divided, after payment of his debts, as "follows: £50 to B; £100 to C, &c.; £3000 to £4000, or whatever remaining sum or sums, to A." Lord Langdale, M. R., said, that if the first clause had been the only one in the will, there would have been strong reason for extending the operation of the words "all other goods," &c.; but that the testator did not intend all his estate to pass was shown by his subsequently stating what were his intentions as to a particular part of it. Those words must, therefore, be restricted to goods *ejusdem generis*.

In each of the two last cases, the dispositions of particular portions of the personal property, which followed the disputed clause, comprised a gift to the same person who was entitled under the first clause; that, at least, was the ground (however unsupported by the actual fact) upon which Sir W. Grant expressly went in the case before him; and where other persons are alone contemplated in the subsequent dispositions, the argument in favor of the restrictive construction is much weakened: for, as before observed, though the residuary clause is usually, it need not necessarily be, the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it.](l)

A more forcible argument in favor of the restricted construction, however, occurs where the testator has added to the equivocal words in question terms descriptive of a particular species of property, which those words in their larger sense would comprehend.(m) In such case, the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language, without any additional meaning.

Thus, in *Timewell v. Perkins*, (n) where the will was in the follow-

[(l) See *Rogers v. Thomas*, 2 Kee. 8; *Martin v. Glover*, 1 Coll. 269; *Arnold v. Arnold*, 2 My. & K. 365. "A well-established rule of construction," per Jessel, M. R., 2 Ch. D. 513.

Assignment of goods to which assignor is now entitled, what passes.—

(m) An assignment of "all household goods, &c., and other estate and effects, of or to which" the assignor is "now possessed or entitled," or "belonging or due" to him, was held not to pass a con-

tingent interest under a will, *Pope v. Whitcombe*, 3 Russ. 124; In re *Wright's Trusts*, 15 Beav. 367; but the ground of these decisions is distinct from that treated of in the text; see, too, *Iverson v. Gassiot*, 3 D., M. & G. 958.]

(n) 2 Atk. 103. [But was not "as" (plate, &c.,) equivalent merely to "*exempli gratia*," and less restrictive even than subsequent enumeration, as to which see *Bridge v. Bridge*, stated *post* p. *759?

ing words:—"I give to M. T. all mortgages, ground *rents, judgments, &c., *whatever I have or shall have at my death*, as plate, jewels, linen, household goods, coach and horses, for her use." Fortescue, J., held, that goldsmiths' notes and bank bills did not pass under the bequest: for though there was no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which followed, "as plate, jewels," &c., confined and restrained them to things of the same nature; he said it was so laid down in *Strafford v. Berridge*. (o)

So, in *Crichton v. Symes*, (p) where a testatrix bequeathed to A and B, all her *goods*, wearing apparel, of what nature and kind soever, except her gold watch. Lord Hardwicke was of opinion, that the words were not intended to be a residuary clause; observing, that the testatrix afterwards gave a legacy of £50 to her executor, and that there was not the word *residue*. It had been insisted, he said, that the words "wearing apparel" explained the testatrix's meaning, as if she had said, "all my goods, (to wit) my wearing apparel;" but wearing apparel must be construed the same as *and* wearing apparel, for there was no occasion to introduce wearing apparel, in order to except the gold watch,

"Goods, wearing apparel, of what nature and kind soever, except my gold watch."

Principle in text applied to bequest of goods, &c., answering to a certain locality.—[(o) *Mos*. 208,] 1 Eq. Cas. Ab. 201, pl. 14. A bequeathed all his *goods*, chattels, household stuff, furniture, and other things, which were then, or should be, in his house at the time of his death. Decreed, that money in the house did not pass; for, by the words *other things*, should be intended things of like nature and species with those before mentioned; see also [*Sanders v. Earle*, 2 Ch. Rep. 98, cited in] *Anon.*, Finch 8, where a bequest of all the goods and chattels, plate, jewels, household stuff and stock upon the ground, in and belonging to the testator's house in N., was held not to include a sum of money found in the house; *Roberts v. Kuffin*, 2 Atk. 113, where a bequest of all goods and things of every kind and sort whatever, which should be found in a certain closet, was held not to comprise a sum of money found in the closet; [and *Gibbs v. Lawrence*, 7 Jur. (N. S.) 134, 30

L. J., Ch. 170.] In *Sanders v. Earle*, and *Roberts v. Kuffin*, some stress was laid on the fact of a pecuniary legacy being bequeathed to the same legatee; [as to which, however, see *ante* p. *752, n. (i).]

The several preceding cases illustrate the application of the principle stated in the text, to bequests of personal movable property answering to a certain locality. [*Swinfen v. Swinfen*, 29 Beav. 207, where money and live and dead stock passed under a gift of "furniture and other movable goods here;" and *Kennedy v. Keily*, 28 Beav. 223, where horses and carriages kept in the stable passed under a gift of a "house and all buildings belonging to me, furniture and what the said buildings may contain;" illustrates the modern tendency to reject a restricted construction. A gift of all in a certain locality "or elsewhere" includes the general personal estate, *In re Scarborough*, 30 L. J., Prob. 85, 6 Jur. (N. S.) 1166.] (p) 3 Atk. 61.

for if she had said "all my goods, except my gold watch," it would have done as well; and it was his opinion, that, as the words stood in the will, she intended to give only her wearing apparel, ornaments of her person, *household* goods and furniture, and no other parts of her personal estate; the testatrix here meant to give, not only what was properly clothes, *but the ornaments of her person, and the exception of the gold watch showed the latitude of the expression.²

[So, in *Steignes v. Steignes*, (q) where the testator gave to his wife, "besides all movables, plate, jewels, pictures, linen, &c., (except three books of miniatures and his whole library), £6000 South Sea stock:" Sir J. Jekyll, M. R., said, that by the bequest of £6000 stock, besides all the movables, the testator had shown, that, in his understanding of the word, "movables" would not comprehend stock. The consequence was, that though the word, if unrestrained by the context, would take in the whole purely personal estate, yet here it must be confined to corporeal movables, to the exclusion of all matters of a like nature with the stock.³ Moreover, the testator had given away his debts in another clause.] (r)

In some instances, however, the argument in favor of the restricted construction, founded on subsequent expressions, descriptive of a particular species of property, has not been allowed to prevail against the force of the previous general words.

Thus, in *Bennett v. Bachelor*, (s) where a testator bequeathed unto P. (to whom he had before devised real estates, and had also given specific legacies) all his household goods, books, linen, wearing apparel and all other, not before be-

Subsequent
expressions
held not to be
restrictive.

2. *Gooch v. Gooch*, 33 Me. 535.

[(q) Mos. 296.]

3. See *Sneed v. Ewing*, 5 J. J. Marsh. 460; *Strong v. White*, 19 Conn. 238; *Wood v. George*, 6 Dana 343; *Jackson v. Vanderspeigle*, 2 Dall. 142; *Jackson v. Robinson*, 1 Yeates 101; *Penniman v. French*, 17 Pick. 404.

[(r) The M. R. also said that the words, "plate, jewels, pictures, linen," would not confine the generality of the word "movables," though they were only corporeal things, for "&c." must signify, *et cætera mobilia*. Nor was the sense of it restrained by the exception. "*Et cætera*" having no substantive expressed, is more dependent for its meaning on the context than "other

effects." In *Chapman v. Chapman*, 4 Ch. D. 800, where a testator directed his widow to pay his debts, and then bequeathed to her "all his money, cattle, farming implements, &c., she paying" certain legacies, it was held by Jessel, M. R., that she took everything; see also *Gover v. Davis*, 29 Beav. 225. In *Newman v. Newman*, 26 Beav. 220, and *Barnaby v. Tassell*, L. R., 11 Eq. 363, "etc." was held to mean other things *ejusdem generis*, and in *Twining v. Powell*, 2 Coll. 266, other things before mentioned.]

(s) 3 B. C. C. 29, 1 Ves., Jr., 63; see also *Flemming v. Burrows*, 1 Russ. 276, post p. *758.

queathed, *goods and chattels that he should be in possession of at the day of his decease*, except the plate and legacies before and thereafter given and bequeathed; and he also bequeathed to the said P. all moneys due from his (the testator's) tenants, and other persons. Lord Thurlow held, that the whole residue passed by the bequest; observing, in reference to the latter words, that the testator might not know that the debts would pass by the words "goods and chattels."

A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of *certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted.

Exception, where explanatory of doubtful words.

Thus, in *Hotham v. Sutton*, (t) where A, having two sons and a daughter, B, C and D, after bequeathing for their benefit a sum of £12,700 consols, gave all the residue of her personal estate and effects to her youngest children, C and D, as therein mentioned. A, on the day of making her will, executed a codicil, and revoked so much of her will as related to the bequest to her son C, of a share of her "plate, linen, household goods, and other effects, (money excepted,)" and gave the whole thereof to her daughter. The question was, whether the revocation extended to the general residuary personal estate, or whether the words "and other effects" were not restrained by the prior terms to articles *ejusdem generis*. Lord Eldon decided in favor of the former construction. He observed, "The doctrine appears now to be settled, that the words

"Household goods and other effects, money excepted."

Mortgage bond, and bankers' receipts held not to pass as property in a house.—(t) 15 Ves. 319. Cf. *Fleming v. Brook*, 1 Sch. & Lef. 318, where Lord Redesdale, on the authority of *Moore v. Moore*, 1 B. C. C. 127, held, that a bequest of "all my property, of whatever nature or kind the same may be, that may be found in A's house, except a bond of B in my writing-box," did not pass a mortgage security, and another bond and

certain bankers' receipts, which were in the house, on the ground that choses in action had no locality for this purpose (a doctrine which is now well settled, 1 Ves. 273, 1 B. C. C. 127, 129, n.; [7 Beav. 1; but see 29 L. J., Ch. 486]); and his lordship being of opinion that an exception in the will of one security was not sufficient evidence of the testator's intention to pass all the other choses in action.

'other effects' in general, mean effects *ejusdem generis*. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen and household goods.⁴ The express exception of money out of the other effects shows her understanding, that it would have passed by those words; that express words were required to exclude it, and by force of that exclusion of the excepted article, she says, she thought the words of her bequest would carry things *non ejusdem generis*. This disposition must, therefore, be taken to comprehend all that she has not excluded, which is money only." (u)

It will be observed, that Lord Eldon, in the last case, lays it down, that the words "other effects," in general, mean effects *ejusdem generis*; (x) but such a position seems scarcely to accord with some subsequent decisions about to be stated; one of which, it will be seen, was determined by the same judge who decided *Rawlings v. Jennings*, (y) which case certainly carried the restricted construction to its extreme point; and probably was in Lord Eldon's view, when he advanced the above *dictum*.

Thus, in *Campbell v. Prescott*, (z) where a testator gave to his sons A. and J. all his sugar-house, cupola and merchandise stock, with jewels, plate, household goods, furniture *and all effects whatsoever*, and appointed them executors; Sir W. Grant, M. R., held, that the whole personalty passed under this clause; remarking, that there was no case for the restrictive sense attempted to be put upon the words "all my effects whatsoever."

So, in *Michell v. Michell*, (a) Sir J. Leach, V. C., held, that the personal estate of a testator passed under a bequest of all and singular his plate, linen, china, household

"And all effects whatsoever," not restricted by association with more limited terms.

"Plate, &c., and effects, that I shall die possessed of."

4. See *Hooper's Estate*, 1 Brewst. 462; 399, 409; In re *Crawhall's Trusts*, 2 Jur. Carnagy v. Woodcock, 2 Munf. 234; Richardson v. Hall, 124 Mass. 228; Dayton v. Tillou, 1 Rob. (N. Y.) 21; Tefft v. Tillinghast, 7 R. I. 434; Bunn v. Winthrop, 1 Johns. Ch. 329; Dole v. Johnson, 3 Allen 364; Browne v. Cogswell, 5 Allen 556.

(x) So per Lord Redesdale, *Stuart v. M. of Bute*, 1 Dow 84, 87.]

(y) *Ante* p. *752.

(z) 15 Ves. 503.

(a) 5 Mad. 69.

[(u) See also *Bland v. Lamb*, 2 J. & W.

goods, and furniture (b) **and effects that he should die possessed of.* He considered that this construction of the word "effects" was aided by the subsequent words, "that I shall die possessed of," and observed, that the expression was not household goods, furniture and effects; but "household goods *and* furniture *and* effects," which imported a distinct sense in the word "effects."

[And in *Hearne v. Wigginton*, (c) before the same judge, where,

"Household goods," "furniture," and "household effects."—(b) The words "household goods," or "furniture," will include pictures hung up, and plate and house linen; [Amb. 605, 2 P. W. 419, 5 Russ. 312;] unless these words are used elsewhere in the will in contradistinction thereto; Pre. Ch. 251; [also prize medals, coins and trinkets, if framed and hung, or otherwise disposed for ornament, 21 L. T. 40, 5 Russ. 321, 29 Beav. 573;] but not books, 3 Atk. 201, Amb. 605, [Mos. 112, 5 Russ. 321; (unless an intention to include them appear by the context, 10 Beav. 462, 3 Russ. 301, 11 W. R. 417; and they have been held to pass as articles of domestic use or ornament, 12 Sim. 303, which brings them within the definition of "furniture," Amb. 610, *sed qu.*);] nor wines [or other consumable articles;] 3 Ves. 311, [3 P. W. 334;] nor goods belonging to the testator in the way of, [or used in carrying on,] trade; 2 P. W. 302, 1 Ves. 97, Amb. 611, [7 D., M. & G. 55; nor farming stock, 3 Jo. & Lat. 727, 29 L. J., Ch. 875; nor, in general, tenants' fixtures, *i. e.*, they will generally pass with the testator's interest in the house, Mos. 112, 10 Ch. D. 13. In *Paton v. Sheppard*, 10 Sim. 186, the house had been settled *without* the tenant's fixtures, and these were held to pass to the legatee of the furniture as against the residuary legatees. Under the terms "household furniture, implements of household and articles of vertu," telescopes have been held to pass, 2 De G. & S. 425; as to a bust, *quære*, 1 Beav. 189.] The words "household furniture and other household effects," it seems, extend to all that

is in the house for use, consumption or ornament, and have been held to comprise pistols, apparatus for turning, models, pictures, organ, parrot, books, wines and liquors, but not a pony or cow, or a fowling-piece, unless used for domestic defence; [Cole v. Fitzgerald, 1 S. & St. 189, 3 Russ. 301, and n.; Stone v. Parker, 29 L. J., Ch. 874; nor articles exclusively of personal ornament, 2 K. & J. 635. But the circumstance that the article has been sent away for repair or sale, will not exclude it, 2 Jur. (N. S.) 514.] "**Live and dead stock.**"—As to the words "live and dead stock," see 3 Ves. 311, 3 Mer. 190, [12 Beav. 357, 11 W. R. 417 (where books and wine were held included).] Growing crops, it seems, will pass under a bequest of stock of a farm, 6 East 604, n.; or stock upon a farm, 8 East 339; [but see 5 Russ. 12;] and see 1 Roper on Leg., by White, 249. ["**Movables.**" — "**Movables,**" unrestrained, will take in all pure personality, Mos. 296; and articles *temporarily* removed from a place will pass as articles *in* that place, 4 B. C. C. 537, 2 Jur. (N. S.) 514; but not articles permanently removed, 3 Mad. 276, 21 Beav. 548, 1 Jur. (N. S.) 250; nor articles intended to be, but never yet, taken thither, 2 De G. & S. 425; (but see 3 Ch. D. 302.) "**My freehold house and property situate in W. road,**" was held not to carry chattels temporarily on ground near the house, 2 Gif. 277. "**Plant and goodwill.**"—Under a gift of "plant and goodwill," the house of business held at rack-rent was decided to pass, *Blake v. Shaw*, Johns. 732.

(c) 6 Mad. 119.]

"Spoons, &c., to A, and all other effects to B." after giving several pecuniary legacies, a testator bequeathed his wearing apparel to A; and to B and C two large silver spoons, one silver cream jug, six tea-spoons, one pair silver buckles; and *all his other effects* he willed to D to be sold for his benefit: D was held to be clearly entitled to the general residue, although some of the particulars comprehended in it were not strictly speaking the subject of sale.]

Again, in *Flemming v. Burrows*, (d) where a testator, after commencing his will with the words "As for such temporal estate as God in his mercy hath bestowed upon me, I give and dispose of the same as followeth;" devised certain lands to his natural son D., adding, "likewise my furniture, plate, books, and live stock, or *whatever else I may then be possessed of at my decease*, also my shipping and ropery concerns at W. and H.," he paying the debts. It was contended that these words were to be confined to articles *ejusdem generis* with those specified before, i. e., furniture, &c., with which they stood immediately associated, and also on the ground of their being followed by the mention of specific articles, which were already included, if the previous words amounted to a general residuary gift; but Lord Gifford, M. R., held, on the authority of and the reasoning in *Bennett v. Bachelor*, (e) that these circumstances were inadequate to restrain the generality of the bequest.

[In *Arnold v. Arnold*, (f) the testator, who was in India and made his will there, "bequeathed to his wife £1000; also his wines and property in England," and gave other legacies. Lord *Cottenham, then M. R., held that all the testator's property in England (which consisted of wines, stock, cash at his banker's, and other particulars), went to the wife.⁵ It was obvious, he said, that the mere enumeration of particular articles, followed by a general bequest, did not of necessity restrict the general bequest, because a testator often threw in such specific words, and then wound up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted.

Lord Cottenham's statement of the general rule is the exact contrary of that cited from *Hotham v. Sutton*, and is now generally accepted.

(d) 1 Russ. 276; see also *Sutton v. Sharp*, Id. 145.

[(f) 2 My. & K. 365.]

5. *Mooney v. Evans*, 6 Ired. Eq. 363.

(e) *Ante* p. *755.

"The mere enumeration of some items before the words 'other effects' does not alter the proper meaning of those words." (g)

In *Parker v. Marchant*, (h) it was noticed by Sir J. K. Bruce, V. C., as a circumstance favoring the unrestricted construction that the general terms there followed the specific. But as already shown, (i) a contrary order does not necessarily lead to a contrary result: and in *Fisher v. Hepburn*, (k) where a testator expressed himself as follows: "As to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china and furniture, I give, devise and bequeath the same to my wife, for her own use and benefit;" Sir J. Romilly, M. R., held the wife entitled to the general residue. "The latter words," he said, (l) "are not words of restriction; they are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a *videlicet*, a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles." The case here referred to by the M. R. was probably that of *Bridge v. Bridge*, (m) *where a testator, after

Special terms following the general, not necessarily restrictive.

Defective enumeration.

[(g) Per Jessel, M. R., *Hodgson v. Jex*, 2 Ch. D. 122. See also *Parker v. Marchant*, 1 Y. & C. C. C. 290, 1 Phil. 356; *Read v. Hodgkins*, 7 Ir. Eq. Rep. 17; *Baker v. Mason*, 2 Jur. (N. S.) 539; In re *Cadge*, L. R., 1 P. & D. 543; *Harris v. James*, 12 W. R. 509; *Stratton v. Hillas*, 2 D. & War. 51, a very special case. Where the expression which follows the specific enumeration is unambiguous, as "all other the rest of my *personal estate*," there is still greater difficulty in limiting its meaning, *Martin v. Glover*, 1 Coll. 269; *Nugee v. Chapman*, 29 Beav. 290.

(h) 1 Y. & C. C. C. 295, 301. See also by the same judge 1 D., F. & J. 416, and by Romilly, M. R., In re *Kendall*, 14 Beav. 611. It is singular that this circumstance which these learned judges thought was in favor of the larger construction was stated by Lord Lyndhurst to be essential to the restricted construction, see *Lewis v. Rogers*, 1 C., M. & R. 52 (deed.)

(i) *Bennett p. Bachelor*, ante p. *755.

(k) 14 Beav. 627. See also *Kendall v.*

Kendall, 4 Russ. 360; *Avison v. Simpson*, Johns. 43.

(l) Citing Sir W. Grant, *Cambridge v. Rous*, 8 Ves. 26.

(m) 8 Vin. Abr. Devise, O. b., pl. 13; and see *Chalmers v. Storil*, 2 Ves. & B. 222; *Nicholas v. Nicholas*, Taml. 269; *Ellis v. Selby*, 7 Sim. 352; *Everall v. Browne*, 1 Sm. & Gif. 368; *Choyce v. Ottey*, 10 Hare 443; *Banks v. Thornton*, 11 Hare 176; In re *Goodyar*, 1 Sw. & Tr. 127, 4 Jur. (N. S.) 1243; *Gover v. Davis*, 29 Beav. 222; *Dean v. Gibson*, L. R., 3 Eq. 713; *King v. George*, 4 Ch. D. 435, 5 Id. 627. See also *Reeves v. Baker*, 18 Beav. 372; *Armstrong v. Buckland*, Id. 204. In *Att.-Gen. v. Wiltseere*, 16 Sim. 36, the general terms, "all the property of which I am possessed," were held to be restricted to property in a particular place by force of the context, especially by the sentence "the property above referred to is at A." And in *Enohin v. Wylie*, 1 D., F. & J. 410, 10 H. L. Cas. 1, "all my capital in ready money and bank billets" was held a description of a limited

bequeathing certain legacies, gave the remainder of his estate, viz., his bank stock, India stock, and S. S. stock and S. S. annuities, to A, and made him sole executor. Lord King held that the words under the *videlicet* did not restrain the general words, "but were added by way of enumeration or description of the main particulars whereof the estate consisted; and the rather, because immediately after follow the words, 'and I do hereby make him sole executor.'" And in a similar case, (n) Sir W. P. Wood, V. C., said, "The strong presumption is that the testator did not mean to do only what he might have effectually done by giving the enumerated articles simply." It scarcely need be added that it is immaterial that the enumeration comprises trivial things only, and omits all the important items of the personal estate. To hold the contrary would involve the admission of evidence to prove what the testator's personal estate consists of at the date of the will; which we have before seen is inadmissible. (o)

These cases indicate the disposition of the judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense.

It is to be observed, however, that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favor of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective.

To this ground may be referred the case of *Woolcomb v. Woolcomb*, (p) where the testator gave to his wife all the furniture of *his parsonage house, and all his plate, household goods, *and other goods*, (except books and papers,) and all his stock within doors and without, and all his corn, wood, and other goods, belonging to his parsonage house; and gave the residue of his personal estate to J. The question was, whether ready money, cash, and bonds, should pass to the wife. It was contended, that the devise of all the testator's goods should carry all his personal estate;

part of the testator's capital, not a case of enumeration. See also *Stooke v. Stooke*, 35 Beav. 396. And see *Slingsby v. Grain-ger*, 7 H. L. Cas. 273.

(n) *Dean v. Gibson*, L. R., 3 Eq. 717.

(o) *King v. George*, 5 Ch. D. 627.]

(p) 3 P. Wms. 112, Cox's ed.; [see *Marks v. Solomons*, 19 L. J., Ch. 555.

omnia bona being words of the largest extent and signification, with regard to personals. To which it was answered, that if the devise of all the testator's goods were to be taken in so large a sense it would disappoint the bequest of the residue; that the words "other goods" should be understood to signify things *ejusdem generis* with household goods, in order that the whole will might take effect. And of that opinion was Lord King.

[So in *Lamphier v. Despard*, (q) where a testator, after devising certain real estates to his wife, bequeathed to her "all his household furniture, plate, house-linen, and all other chattel property that he might die seized or possessed of;" and after giving various legacies, he appointed A his executor and residuary legatee; Sir E. Sugden held that all other chattel property meant all *ejusdem generis*; relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money; so that the clause could not be a general bequest of the entire personal estate.

A residuary gift of personal estate (r) carries not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption Effect of a general bequest of residue. arises for the residuary legatee against every one except the particular legatee: for a testator is supposed to give his personality away from the former only for the sake of the latter. (s) It has been said, that, to take a bequest of the residue out of the general rule, very special words are required, (t) and accordingly a residuary bequest of property "not specifically given," following various specific and general legacies, will include lapsed specific legacies. (u)⁶ And a gift of all a testator's personal estate, *except* certain *specific sums of stock and money, followed by a bequest of those particulars, was held, in *Evans v. Jones*, (x) to include some of the specific legacies which had failed. And in *James v. Irving*, (y) where the bequest was of "every-

(q) 2 D. & War. 59; see also *Stuart v. Marquis of Bute*, 1 Dow 73; *Barret v. White*, 24 L. J., Ch. 724, 1 Jur. (N. S.) 652; *Mullins v. Smith*, 1 Dr. & Sm. 204; *Gibbs v. Lawrence*, 7 Jur. (N. S.) 134, 30 L. J., Ch. 170.

(r) As to real estate see *ante* p. *645.

(s) Per Sir W. Grant, *Cambridge v. Rous*, 8 Ves. 25; see also *Leake v. Robinson*, 2 Mer. 393; *Reynolds v. Kortwright*, 18 Beav. 427.

(t) Per Lord Eldon, *Bland v. Lamb*, 2 J. & W. 406; see also *Cunningham v. Murray*, 1 De G. & S. 366, rev. on app. 12 Jur. 547.

(u) *Roberts v. Cooke*, 16 Ves. 451; see also *Clowes v. Clowes*, 9 Sim. 403.]

6. *Havens v. Havens*, 1 Sandf. Ch. 324; *Bullard v. Goffe*, 20 Pick. 252; *Tindall v. Tindall*, 9 C. E. Gr. (N. J.) 512.

[(x) 2 Coll. 516.

(y) 10 Beav. 276; see also *Dobson v.*

thing real and personal, &c., *except* the S. shares, which were not to be sold until after the death of A.:" Lord Langdale, M. R., held, that the exception of the shares was only for the purpose of postponing the sale, and that they passed by the bequest.

So, in *Markham v. Ivatt*, (z) a gift of "all the residue of my freehold and leasehold hereditaments, estate and premises, whatsoever and wheresoever, not hereinbefore otherwise disposed of," was held not to be confined by a previous direction, that a reversionary interest in certain specified leaseholds should "form the residue of her leasehold estates," but that other leasehold property also passed thereby. And in *Bernard v. Minshull*, (a) where, under a general power of appointment, (b) a married woman bequeathed the whole fund to her husband, but requested him after reserving a specified part for his own use, to dispose of the rest as would best carry out her wishes often expressed to him; and then bequeathed all other her property to her husband. The trust having failed for uncertainty, it was held that the husband was entitled not only to the sum which he was specially allowed to reserve, but also under the residuary clause (which, under § 27 of the wills act, operated as an appointment) to the entire remainder of the fund.

However, if the words of the will show that the testator intended the residuary bequest to have a limited effect, the presumption in favor of the residuary legatee will, of course, be effectually rebutted; the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

In *Davers v. Dewes* (c) a testator gave part of his plate to A, and declared that he intended to dispose of the residue thereof, and of the goods and furniture in C house, by a codicil; he then bequeathed the residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil, to A. He made two codicils without disposing of the reserved *articles; but Lord King held, that being expressly reserved to be disposed of by a codicil, those articles could not pass by the devise of the residuum by the will.

Banks, 32 Beav. 259; *Read v. Hodgkins*, 7 Ir. Eq. Rep. 17; *Sheffield v. Lord Orrery*, 3 Atk. 286; *Thompson v. White-lock*, 4 De G. & J. 490.

(z) 20 Beav. 579.

(a) *Johns*. 276.

(b) *Vide ante* p. *682.

(c) 3 P. W. 40. See also *Ludlow v. Stevenson*, 1 De G. & J. 496, (gift of "property not otherwise disposed of" restricted by context.)

Again, in *Att.-Gen. v. Johnston*, (*d*) where, after giving legacies to a considerable amount, the testator gave to a hospital £100, "that is, if there remained enough of his personal estate to satisfy it; but if not, or in case there remained but little, then the £100 to the hospital should not be paid; and the *small remainder* of his personal estate should be left to his executor," in trust for charity schools; "so as it was likewise his will, that if his personal estate should sufficiently reach towards satisfying all the legacies by him bequeathed and above mentioned, that his said executor should also dispose of the remainder in favor of" the charity schools. Lord Camden held that legacies to a large amount which had lapsed did not pass by the residuary bequest. He looked upon the bequest to be specific, contingent, and conditional; that is, "In case my estate turns out to pay all my other legacies, and there should be a little more, then I give that little."

And in *Wainman v. Field*, (*e*) (which on account of the similarity of the *form* of the bequest to that in *Evans v. Jones*, (*f*) well illustrates the rule,) a testator bequeathed to trustees all his personal estate, (except such parts as were particularly disposed of, "and also except such leasehold estates as he should be entitled to at his decease; which leasehold estates he declared it to be his intention to exonerate from the payment of his debts and legacies,") upon trust to pay debts, funeral expenses, and legacies; "and in case there should be any residue of his said personal estate (except as aforesaid) beyond what should be sufficient for the payment of his said debts and legacies," he gave the same to A. The will then contained a devise of the testator's freehold estates, and a bequest of his leaseholds, which was void for remoteness: and the question being whether the leaseholds passed by the residuary bequest, Sir W. P. Wood, V. C., held that they did not. "The testator excepts the leaseholds," he said, "for the reason that he wishes to exonerate them from the payment of his debts and legacies, and not for the purpose of making a particular bequest of them." And again, "The testator had both an intention to bequeath those leaseholds for other purposes, and a negative intention not to give them for those particular purposes," (*i. e.*, for payment of debts and legacies.)

*To hold that the negative intention was independent of the intention to bequeath, may seem a rigid construction. But, being made,

(*d*) *Amb.* 577.

2 Coll. 648.

(*e*) *Kay* 507; see also *Russell v. Clowes*, (*f*) 2 Coll. 516, *ante* p. *762.

[*764]

it marks the distinction in principle between this case and *Evans v. Jones*, and *James v. Irving*. (g)

When the disposition of an aliquot part of the residue itself fails from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of. In illustration of this well-settled rule it will suffice to mention the case of *Skrymsher v. Northcote*, (h) where a testator gave his residuary estate equally between his two daughters; but in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave £500 to H., and "the remainder of that moiety" to the other sister. The testator revoked the gift of £500 without making any fresh disposition of it, and Sir T. Plumer, M. R., held that it went to the next of kin. "Residue," he said, "means all of which no effectual disposition is made by the will, *other than* the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole."

And this rule has been held to prevail, though the testator directed that in a certain event (which happened) the aliquot part should sink into the residue and be disposed of accordingly; this not being equivalent to saying it should belong to the other residuary legatees. (i) But it is a mere question of intention, and in *Evans v. Field*, (k) where a testatrix directed her executors to stand possessed of her residuary personal estate after satisfying legacies, *and also of so much of her personal estate the trusts whereof should fail*, upon trust for division in elevenths, one share being separately given to each one of eleven named persons. One of these died before the testatrix, and it was held by Sir L. Shadwell, V. C., that the whole residue went to the other ten. He said the gift of the residue was in the first place among the eleven; but then the testatrix directed that so much of her personal estate, the trusts whereof should fail, should be disposed of according to the same trusts; and one share having lapsed, he thought the necessary effect of that direction was to make the residue divisible into ten parts instead of eleven. (l)

(g) *Ante* p. *762.

(h) 1 Sw. 566; see also *Lloyd v. Lloyd*, 4 Beav. 231; *Green v. Pertwee*, 5 Hare 249; *Gibson v. Hale*, 17 Sim. 129; *Simmons v. Rudall*, 1 Sim. (N. S.) 115.

(i) *Humble v. Shore*, 7 Hare 247; *Lightfoot v. Burstall*, 1 H. & M. 546.

(k) 8 L. J. (N. S.) 264.

(l) *Semb.* by the lapsed share being divided into elevenths, and one of those

*It has already been observed (*m*) that a general bequest of chattels of a particular species carries all the chattels of that kind which the testator is possessed of at the time of his death ; General bequest of particular residue. as, mortgages, stocks or furniture. Thus, a gift of "any small sum remaining in the bank after my funeral expenses have been paid," was held to carry the testatrix's balance at her bankers at the time of her death, although, in the meantime, it had increased from £480 to £1370, and notwithstanding the word "small." (*n*) In the fluctuating character of the property comprised in it such a bequest resembles a general bequest of all the personal estate, and, by analogy to a bequest of the latter kind, a bequest of a particular residue is held to include all of the particular kind which in event is not otherwise disposed of. Thus, in *De Trafford v. Tempest*, (*o*) where a testator gave to his widow certain chattels which, at his decease, might be in or about his house at T., and bequeathed to his son all his household and other furniture, plate and chattels, not thereinbefore otherwise disposed of, which at his decease might be in or about his said house; and afterwards bequeathed his residuary estate to other persons: the widow died before the testator, and it was held by Sir J. Romilly, M. R., that the chattels, whereof the bequest to the widow had lapsed, fell into the particular residue and passed to the son.

But where a testator is dealing with a fund which he estimates at a certain amount, it is indifferent whether, after disposing of certain portions, he specifies the remainder by stating its amount or by comprising it under the term "residue." Effect of a gift of the "residue" of a definite sum; In either case, if the disposition of any portion fails, it will lapse, and not pass as part of the "residue." (*p*)

This construction depends on the fund being ascertained, or rather on its being so treated by the testator. Where this is not the case, the general rule as to the comprehensiveness of a particular residue prevails. Thus, in *Falkner v. Butler*, (*q*) where a testatrix, having under her deceased husband's will special power to appoint the residue of his personal estate, appointed several legacies,

elevenths again subdivided, *ad infin.*, as in *Atkinson v. Jones*, Johns. 246.

(*m*) *Ante* p. *691.

(*n*) *Page v. Young*, L. R., 19 Eq. 501.

(*o*) 21 Beav. 564, and see *Mitchell v. M'Isaac*, 18 Jur. 672.

(*p*) *Easum v. Appleford*, 5 My. & Cr. 56; *Page v. Leapingwell*, 18 Ves. 463;

Wright v. Weston, 26 Beav. 429; In re *Jeaffreson's Trusts*, L. R., 2 Eq. 276, (part appointed to a stranger to power.) According to *Hunt v. Berkley*, Mos. 47, the lapsed legacy would pass by a general residuary bequest in the same will.

(*q*) *Amb.* 514.

including one to a stranger, and then appointed "the *residue of her husband's estate after payment of the legacies;" it was held that the residue carried the ill-appointed legacy. It is to be observed that here, although when the testatrix made her will her husband's estate may have consisted of an ascertained sum, (r) she did not so refer to it. The material circumstance was, therefore, wanting to show that she was parceling out a fixed sum in definite proportions.

And in *Petre v. Petre*, (s) where a testator, having a general power over a sum of £7100 stock, gave certain money legacies thereout, and the residue, after deducting the legacies, to his son; the fund having by the appointment become subject to debts, and the amount it would produce by a sale being uncertain till it was sold, Sir J. Romilly held the gift of the residue to be not specific, but merely residuary, and subject to all the incidents of a common residue. (t) After adverting to the rule in *Page v. Leapingwell*, he continued, "In this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realized by a sale, and the charges on it known. If, in this case, the testator thought he was dealing with £7100 sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion was called 'the residue,' but that is not the case here."

An express charge of debts on the fund shows that a testator does not mean the legatee of "residue" to take a definite proportion of the fund, the debts being of altogether uncertain amount. (u) But it does not appear that the charge of debts which, by a rule of law only, and not by express provision, attached to the fund in *Petre v. Petre*, was essential to the decision in that case, even if it could properly be per-

(r) *Vid. per Wood, V. C., Johns. 206.*

(s) 14 Beav. 197.

(t) If the fund falls short of the estimated amount, all must abate ratably, *Page v. Leapingwell, sup.*; *Haslewood v. Green*, 28 Beav. 1; *Elwes v. Causton*, 30 Beav. 554; *Walpole v. Apthorp*, L. R., 4 Eq. 27; *Miller v. Huddleston*, L. R., 6 Eq. 65. If the remainder is not given at all, the case is different, and the specific portions are payable in full, *Booth v. Alington*, 6 D., M. & G. 613. Where, as often happens, the question arises upon

an appointment, and the fund is insufficient for all the particular gifts, but one of them lapses—here, as between the appointees and those entitled in default, the lapsed appointment goes to augment the others and to prevent abatement, *Eales v. Drake*, 1 Ch. D. 217.

(u) *Harley v. Moon*, 1 Dr. & Sm. 623; *Baker v. Farmer*, L. R., 3 Ch. 537. So of any other indefinite charge or payment, as, for restoring a church, *Champney v. Davy*, 11 Ch. D. 949.

mitted to weigh. In the case put by the M. R. at the close of the remarks cited above from his judgment, the debts would still have been a *charge on the fund; yet, he said, in that case the residue would have borne only a proportion of the loss. Hence it would seem that wherever there is a gift of money legacies out of a specified sum of stock, followed by a gift of the "residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold. (x) The intention is placed beyond doubt if, to a proper description of the fund, the testator adds "or other the stocks or securities in which the same may hereafter be invested." (y)

Again, in *Oke v. Heath*, (z) where a testatrix had power to appoint £4000, and she appointed the *whole* sum to A, and "the residue of what she had power to dispose of" to B, the gift of residue had nothing to operate upon, except what might fail to take effect under the previous appointment. A died before the testatrix: B therefore took the £4000. So where the testator provided that if a particular gift should fail in a specified manner, it should fall into the residue of the fund, and then bequeathed the residue of the fund, he was held by Sir J. Bacon, V. C., to have shown that he used the word "residue" in its proper sense, so as to include another particular gift which had failed in a manner different from that specified. (a) And, in *In re Harries' Trust*, (b) where a testatrix having a power to appoint £2000 secured by policy, and all bonuses and other moneys payable thereunder, appointed £1000 to A, £1000 to B, and the residue, after payment of said sums, to be divided among the testator's younger sons, with subsidiary clauses regarding "the said residuary moneys and premises;" A died before the testator, and it was held by Sir W. Wood, V. C., upon the whole of the will, that the lapsed sum, as well as the bonuses, passed under the gift of "residue."]

Sometimes it has been a question, whether the word "residue" comprises the general personal estate, or is confined to the undisposed-of portion of a certain property or fund which the testator had just before made applicable to specific and partial purposes.

(x) See acc. *Vivian v. Mortlock*, 21 Beav. 252; *Carter v. Taggart*, 16 Sim. 423.

(y) *De Lisle v. Hodges*, L. R., 17 Eq. 440.

(z) 1 Ves. 135, Johns. 205.

(a) *In re Meredith's Trusts*, 3 Ch. D. 757. See also *Carter v. Taggart*, 16 Sim. 423 (as to the £600 consols.)

(b) Johns. 199.]

As in *Boys v. Morgan*, (c) where the testator, after bequeathing *certain property to E. M., and directing her to avoid expenses in his funeral, added, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts which I hereby desire Mrs. E. M. to do, *and keep the residue for her own will and pleasure.*" Lord Cottenham decided, that the word "residue" was not (as contended) confined to the fund in question. He thought he was precluded from so limiting the term by the context of the will; from the whole of which it appeared, that the testator had assumed that the legatee would be the person interested in the bulk of his estate. He also adverted to the direction to pay the debts, which were by law a charge on the general estate, out of the fund in question.

[But where in a will divided into paragraphs, each dealing with particular items, one paragraph directed debts and funeral expenses to be paid out of specified funds, "The remainder to be equally divided to my children;" it was held by Sir R. Malins, V. C., that, as a general rule, where a will disposes of the variety of property, and winds up with a gift of the remainder or residue, it is a gift of the general residue, but that here the form of the will showed that the testator meant to give only the remainder of the particular funds with which he was dealing in that paragraph.] (d)

As words, in themselves the most general and comprehensive, may, we have seen, be narrowed by their juxtaposition with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context, to embrace the general residue.

In several instances, the word "money" (e) (which is often popularly used in a vague and in*accurate sense, as synonymous with *property*,) has received this construction.

Word "money" held to extend to general residue.

(c) 3 My. & Cr. 661; see also *Crooke v. De Vandes*, 9 Ves. 197, [11 Ves. 330; *Newman v. Newman*, 26 Beav. 218. *Wilde v. Holtzmeier*, 5 Ves. 811, *Wilson v. Wilson*, 11 Jur. 794, and *Holford v. Wood*, 4 Ves. 76, are examples of a restricted construction of the words "all I am possessed of," "remainder," and "personal estate;" see also *Att.-Gen. v. Goulding*, 2 B. C. C. 428.]

(d) *Jull v. Jacobs*, 3 Ch. D. 703; see also *Clifford v. Arundell*, 1 D., F. & J.

307, where, in a deed, "other money in the hands of the trustees" was upon the context confined to income, exclusive of principal moneys.

"Money," to what it extends.—(e) In its strict acceptation "money" will, it seems, extend to bank notes, *Ambler* 280; and no doubt to exchequer bills and other documents payable to bearer; probably also to bills of exchange endorsed in blank, 1 B. & P. 648, 651, 4 B. & Ald. 1, and see 1 Roper on Leg., by White. 252. [It

[The result has generally been due either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money;" or, secondly, where he has shown a clear intention to make a complete disposition of all his personalty, and that intention can only be effected by adopting the enlarged interpretation of the word "money." For

will extend to money in the hands of an agent, L. R., 8 Eq. 434; and it was held in *Shelmer's Case*, Gilb. Eq. Rep. 200, that money lent on mortgage passed by a bequest of "money belonging to a testatrix at her death:" for "money," said Gilbert, C. B., "is a genus that comprehends two species, viz., ready money and money due, *i. e.*, the money in the owner's own hands, and his money in the hands of anybody else." But in *In re Mason's Will*, 34 Beav. 494, a legacy due from another testator's estate was held not to pass by a bequest of "money and securities for money," "*because it was only a debt.*" See also *Byrom v. Brandreth*, L. R., 16 Eq. 475. However, a bequest of "money due to me" will pass such a legacy if the estate out of which it is payable has been got in by the executor so as to constitute a debt from him, *Bainbridge v. Bainbridge*, 9 Sim. 16: otherwise, if the estate has not been so got in, *Martin v. Hobson*, L. R., 8 Ch. 401. "Money due to me" will also include moneys under a policy on testator's own life, *Petty v. Willson*, L. R., 4 Ch. 574, and damages to which he was entitled, though the amount was unascertained, at his death, *Bide v. Harrison*, L. R., 17 Eq. 76. But not money to be paid for a service not completed at the testator's death, *Stephenson v. Dowson*, 3 Beav. 342. Nor will money in the hands of a stakeholder to abide an event which does not happen in the testator's lifetime, pass by a bequest of his "money," 7 D., M. & G. 55.]

Choses in action have no locality.—In *Moore v. Moore*, 1 B. C. C. 127, it was held, that a bequest of "all my goods and chattels in Suffolk" did not comprise

bonds in the testator's house, which was in that county, they having no locality for this purpose, though constituting *bona notabilia*. [And, since all choses in action (except Bank of England notes, Amb. 68, 7 Sim. 671; but not excepting country bank notes, 7 Sim. 671) are equally incapable of acquiring a locality, 7 Beav. 1, it follows that none of the choses in action mentioned above as ordinarily included in the term "money," can pass by a bequest of money in a particular place. Although money at a banker's is in fact a debt due from the banker, 2 H. L. Cas. 31, and will pass under a bequest of "debts," 1 Mer. 541, n., 1 Phil. 361, 16 M. & Wels. 321; yet the terms "ready money" or "money in hand," do also sufficiently describe such money, and generally will pass it, 1 Jur. 401, 1 Y. & C. C. C. 290, 1 Phil. 356, 5 Russ. 12; but not money in the hands of an agent, 1 Y. & C. C. C. 290, 3 Jo. & Lat. 565 (see however 11 Sim. 55, and 23 L. J., Ch. 496;) nor unreceived dividends on stock, the warrants for which have neither been received nor demanded, 3 De G. & S. 462. Money in a banker's hands on a deposit account, whether originally withdrawable at pleasure, on producing the deposit note, or after expiration of notice to withdraw, will also pass by a bequest of "money," or "ready money," 7 D., M. & G. 55, Johns. 49.

"Cash."—"Cash" is a stricter term than money. In *Beales v. Crisford*, 13 Sim. 592, it was held that a promissory note, payable to order, was not included in "cash or moneys so called" (*i. e.*, "cash or money commonly called cash.") Nor would it pass as "ready money," Johns. 49.

it is clear that if the word be used without any explanatory context, it will be construed in its strict sense; (*f*) *a fortiori*, if *the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property alleged to be comprised in it. As where an officer on service, after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson," it was held that a reversionary interest in stock did not pass. (*g*)⁷

Of the first class of cases alluded to, we have an instance] in *Legge v. Asgill*, (*h*) where a testatrix, after bequeathing £200 long annuities amongst several persons in specific legacies, proceeded to give a debt of £2935 due to her, to A

Where testator has charged funeral expenses on "money."

(*f*) See *Shelmer's case*, *Gilb. Eq. Rep.* 202; *Hotham v. Sutton*, 15 *Ves.* 327; *Read v. Hodgkins*, 7 *Ir. Eq. Rep.* 17; *Lowe v. Thomas*, *Kay* 369, affirmed 5 *D. M. & G.* 315; *Larner v. Larner*, 3 *Drew.* 704; *Cowling v. Cowling*, 26 *Beav.* 449; *Williams v. Williams*, 8 *Ch. D.* 789. So a legacy of stock does not come within the description of a "pecuniary legacy," *Douglas v. Congreve*, 1 *Kee.* 410: though in *Barclay v. Maskelyne*, 5 *Jur. (N. S.)* 12, stock legacies were held upon the context to be within a clause revoking "all moneys bequeathed" to the legatees.]

"Securities for money."—But the words "securities for money" will include stock in the funds even without the aid of the context, 4 *Ves.* 725, 1 *S. & St.* 500, [1 *Jur.* 234, 21 *L. J.*, *Ch.* 843; but not bank stock, *L. R.*, 8 *Eq.* 434, nor shares in an insurance, 21 *L. J.*, *Ch.* 843, or canal company, 10 *Beav.* 547, *L. R.*, 8 *Eq.* 434; nor an I O U given for goods sold, 1 *Jo. & Lat.* 475, 23 *L. J.*, *C. P.* 137; nor a banker's deposit note, *L. R.*, 19 *Eq.* 222; nor a legacy due from another testator's estate, 34 *Beav.* 494. But a bill of exchange or promissory note is a "security for money" in the legal and proper sense of the words, 1 *Jo. & Lat.* 475; (see,

however, as to a promissory note, 4 *Y. & C.* 572): so is a bond, 3 *D. J. & S.* 577, and a judgment, *L. R.*, 8 *Ex.* 37: and a policy of assurance on the life of a debtor is a "security," and will pass as a "debenture," 1 *Ll. & Go.* 291.

"The funds."—"The funds," or "the public funds" generally means funded securities guaranteed by the government,—as consols, reduced annuities, long annuities, 27 *L. J.*, *Ch.* 448; and "foreign funds" has been held to mean securities guaranteed by foreign governments, 23 *Beav.* 543, *L. R.*, 10 *Eq.* 39, 5 *Ch. D.* 710. But "funds" will not include bank stock, 7 *H. L. Cas.* 273; nor East India stock, under 3 and 4 *Will. IV.*, c. 85, 4 *K. & J.* 704; nor unfunded exchequer bills, 8 *L. J.*, (*O. S.*), *Ch.* 38; unless there is nothing more appropriate to answer the bequest, 16 *Beav.* 300. As to Irish government debentures, see 2 *D. & War.* 239.

(*g*) *Borton v. Dunbar*, 1 *Gif.* 221, 2 *D. F. & J.* 338. Converse case—declared purpose too large for strict construction of "money," *Prichard v. Prichard*, *L. R.*, 11 *Eq.* 232, stated p. *772.]

7. *Smith v. Davis*, 1 *Grant (Pa.)* 158; *Paul v. Ball*, 31 *Tex.* 10; *Morton v. Perry*, 1 *Metc.* 446; *Beck v. McGillis*, 9 *Barb.*

(*h*) *T. & R.* 265, n., [and cited 4 *Russ.* 369.]

for her separate use; and added, "*I believe there will be sufficient money to pay my funeral expenses*," which she desired might be plain. The testatrix afterwards made a codicil to her will, commencing with the following words:—"If there is any money left unemployed, I desire it may be given in charity. My watch and piano-forte I give to C. The most useful of my clothes to be given to my present servant," and she concluded with some directions respecting the key of a trunk. The question was, whether the general residue, including the reversion of one-fourth of a sum of £10,000 secured by a settlement, passed by these words. Lord Eldon considered that under the will, and especially having regard to the charge of the funeral expenses, the word "money" was intended to comprise the entire personal estate; and that it was impossible to put a different construction upon the same word in the codicil.

[So, in *Rogers v. Thomas*, (i) where a testatrix, after giving various pecuniary and specific legacies, "bequeathed to the inhabitants of T. Row *all which might remain of her money* after her lawful debts and legacies were paid;" and she went on to give other specific and pecuniary legacies: Lord Langdale, M. R., considered the charge of debts and legacies sufficient evidence of the testatrix's intention to include the general residue in the bequest of "all which might remain of her money."

It seems, indeed, that where a bequest of legacies, primarily payable out of the general estate is followed by a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not *expressly* charged the legacies on his "money."

Where there is a bequest of legacies, and a gift of the residue of testator's moneys.

Thus, in] *Dowson v. Gaskoin*, (k) where a testatrix, after bequeathing certain specific and pecuniary legacies, concluded her will as follows: "I appoint A and B my executors, and bequeath £200 to each for their trouble, and whatever remains of money I bequeath to E. D.'s five children." At the date of the testatrix's will and of her death, her personal estate consisted principally of stock, which, it was con-

35; *Mann v. Mann*, 14 Johns. 9; *Beatty v. Lalor*, 2 McCart. 108; *Fulkerson v. Chitty*, 4 Jones Eq. 244; *Paup v. Sylvester*, 22 Iowa 371; *Copia's Estate*, 5 Phila. 214; *Dabney v. Cottrell*, 9 Gratt. 572; *Smith v. Jewett*, 40 N. H. 513.

[(i) 2 Kee. 8; see also *Kendall v. Kendall*, 4 Russ. 360; *Phillips v. Eastwood*,

1 Ll. & Go. 291; *Barrett v. White*, 1 Jur. (N. S.) 652, 24 L. J., Ch. 724; *Grosvenor v. Durston*, 25 Beav. 99; *Stocks v. Barré*, Johns. 54. But this principle will not govern cases where the bequest following such charge is of *ready* money, In re *Powell*, Johns. 49.]

(k) 2 Kee. 14.

tended, would not pass under the word money; but Lord Langdale observed that the [words "whatever remains of money" must signify a remainder at some time, or after some operation upon the sum of which the remainder was contemplated. Was it to be the sum existing at the date of the will, or the remainder of that sum, or of any subsequent sum which might exist at the death of the testatrix, or after payment of her debts and legacies? There was no intimation that she intended the money (literally so called) to be first applied in payment of debts and legacies; and no reason could be given why the court was to apply it first, or to make an apportionment for the purpose of wholly or partially defeating what seemed to be the intention of the testatrix. And he decided that the stock in question passed by the will. (*l*)

Not if there
be a distinct
residuary
bequest.

But the inference to be drawn from the charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money:" (*m*) and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge. Thus, in *Willis v. *Plaskett*, (*n*) where a testatrix made her will as follows: "I first direct my funeral expenses to be paid, and the remainder of what moneys I die possessed of to be equally divided between A and B. I also give to the said A all my wearing apparel, trinkets and all other property whatsoever and wheresoever that I may die possessed of:" Lord Langdale, M. R., said that when a testator directed the payment of his funeral expenses, there was an inference that he was referring to his general personal estate; but that, having regard to the other parts of this will, he was prevented from giving to the word "moneys" its extended meaning.

The second class of cases indicated above is illustrated by *Waite v.*

[(*l*) See also *Lynn v. Kerridge*, West's Cas. temp. Hardwicke 172, (a strong case, as there was there a general residuary bequest;) *Lowe v. Thomas*, 5 D., M. & G. 319; *Langdale v. Whitfield*, 4 K. & J. 426, 436. These cases appear to overrule *Gosden v. Dotterill*, 1 My. & K. 56.

(*m*) Per Leach, M. R., *Collier v. Squire*, 3 Russ. 475.

(*n*) 4 Beav. 208; and see *Williams v.*

Williams, 8 Ch. D. 789 (gift of residue in will not cut down by gift of "money" in codicil); In re *Mason's Will*, 34 Beav. 494. Cf. *Barrett v. White*, 1 Jur. (N. S.) 652, 24 L. J., Ch. 724; and consider *Chapman v. Reynolds*, 28 Beav. 221, especially with reference to the weight there attributed to the fact that the testatrix had no "money" in the strict sense.

Coombes, (o) where a testator, after declaring himself desirous of making a settlement of his affairs, appointed A and B his "executors to take and receive all moneys that might be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if necessary, to be by them placed in the British funds or otherwise laid out" upon security and held in trust: Sir J. Parker, V. C., thought the whole will pointed to a complete disposition of the personal estate, and that, at all events, a sum of consols passed under the word "moneys." It was argued that the direction "to place in the British funds" proved that the testator could not have meant to include the consols in the bequest of "moneys," that direction being wholly inapplicable to them; but the V. C. thought, that to consider that this direction destroyed the generality of the word "moneys," as applicable to the stock, would be to take advantage of a slip of the testator in wording his will, while his meaning was obvious; that if he intended his executors to invest moneys not then invested, *a fortiori* he must have intended moneys which he had himself invested to pass by the will, if the words were sufficient to carry them, as he (the V. C.) thought they were. (p)

Where there is a clear intent to dispose of the whole personal estate.

And in *Prichard v. Prichard*, (q) where a testator appointed an *executor and declared that the income arising from his principal money should be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them; it was held by Sir R. Malins, V. C., that the declared purpose of the gift showed that the whole personal estate was intended to pass, including leaseholds.

Residue, including leaseholds, held to pass as "money."

Where the context shows that the testator means, by "money," his general personal estate, special words should be found to exclude any part of it. (r)

But if the context shows that the word is used in its strict sense, it

(o) 5 De G. & S. 676. As to the weight allowed to the fact that at the time of his death the testator had little besides the consols, *qu.*: and see *Gosden v. Dotterill*, 1 My. & K. 56, which on this point is good law. If the gift is specific such evidence is admissible, *Gallini v. Noble*, 3 Mer. 691.

with limitations over,) as to necessitate an investment, will not suffice to extend the natural import of the word, *Lowe v. Thomas*, Kay 369, 5 D., M. & G. 315; *Larner v. Larner*, 3 Drew. 704; *Williams v. Williams*, 8 Ch. D. 789.

(q) L. R., 11 Eq. 232.

(p) But the mere fact of "money" being so disposed of, (*e. g.*, to one for life,

(r) See per *Kindersley*, V. C., *Barrett v. White*, 1 Jur. (N. S.) 652, 24 L. J., Ch. 724.]

Unless forbidden by the context.

will not receive the more popular construction, merely on the strength of even an expressed intention to dispose of all the estate.] Thus, in *Ommanney v. Butcher*, (s) where a testator, after commencing his will in the following form: "I, A B, considering in what manner I should have my fortune disposed of, in case of my death, do make this my will:"—bequeathed numerous stock and a few money legacies; and after disposing of some books and other specific articles, he directed the remainder of his books, and his jewels, plate and household furniture to be sold; and desired that his clothes and linen might be divided between his servants: he then gave a small pecuniary legacy to his executors, and added, "*in case there is any money remaining*, I should wish it to be given in private charity." Sir T. Plumer, M. R., was of opinion that the concluding clause did not comprehend the general residue; but was to be considered as applying to the residue of the produce of those articles which the testator had directed to be sold, after providing for the payments which were ordered to be made. It will be seen that the clause directing the sale and the clause disposing of the "money" did not stand in immediate connection; [and the M. R. owned there was difficulty in knowing what the testator meant: but he relied on the circumstance, that, up to a certain extent, all the dispositions in the will were legacies of stock; the testator therefore had distinguished where he meant stock to be the subject of his disposition, and the context showed that in the clause in question he was not adverting to the stock. To construe the word "money" to mean stock would be to alter the words of the will contrary to the context.

The modes in which a testator may attach a particular meaning to the word "money" are, of course, various. In *Glendenning v. Glendenning*, (t) a testator bequeathed to his wife "the interest of his money and the use of his goods (u) for her life:" at her death he gave various pecuniary legacies, "and the remainder of his property to be equally divided between his brothers and sisters; his wardrobe to be equally divided between his brothers:" Lord Langdale, M. R., held that the wife was entitled to a life interest in the general residue (consisting of money in the funds, a small sum of cash, and a few chattels,) except the wardrobe. "He gives the interest of the money, and the use of his goods to his wife for life;

(s) T. & R. 260.

(u) No reliance appears to have been

(t) 9 Beav. 324. See also *Whateley v. Spooner*, 3 K. & J. 546.

placed by the court on this word.

and at her death he gives certain pecuniary legacies, and the remainder of his property to his brothers and sisters. What is the time to which he here refers? I think that, looking at the structure of this will, it refers to the wife's death."

The word "money" may of course receive from the context a meaning larger than that which properly belongs to it, but short of comprehending the general residue. Thus, ^{"Money" enlarged to a qualified extent.} where a testator bequeathed stock specifically to one for life, and afterwards left "this money" to B in trust to pay certain portions of the stock to B and others (not exhausting the stock,) and gave "any surplus money" to B: it was held, that B took the undisposed-of stock.](x) 8

So, in *Hastings v. Hane*, (y) where a testator, after bequeathing certain specific and pecuniary legacies, directed A and B to "divide equally any moneys which may remain to my account after payment of the aforesaid sums and my debts." It appeared that the testator had certain accounts with his bankers and other persons; and Sir L. Shadwell, V. C., held that the bequest was confined to the balances owing to the testator on these accounts, and did not comprise the general residue, observing that he was bound to give a meaning to the words "to my account."

[And in *Stooke v. Stooke*, (z) where a testator gave a house and £300 of lawful money to his daughter E., and "the remainder of all his moneys," in whatever it may be—in bonds or consols or anything else, to his wife. Sir J. Romilly held that the wife took all sums secured by any species of security, including a life policy, but not leaseholds, nor furniture, plate, &c. The M. R. said, "if a testator gives matters which are not money, in the *ordinary acceptation of the term, and afterwards gives 'all other my moneys,' he applies that expression to things which are not strictly money, and consequently things not of that character pass under the gift. Thus, if a testator gives 'Whiteacre and all the rest of his money,' he means all his property, for he treats Whiteacre as money." (a) So, any narrower term than "money," *e. g.*, "my money in the S. bonds" may comprehend more than would be signified by that expression alone, if it is given

(x) *Newman v. Newman*, 26 Beav. 218.]

8. See *ante* note 7, p. 374.

(y) 6 Sim. 67.

[(z) 35 Beav. 396.

(a) See also *Montagu v. Earl of Sand-*

wich, 33 Beav. 324; and per Lord Eldon, *Gaskell v. Harman*, 11 Ves. 504. The word "other," or the like, is the essential word, *Collins v. Collins*, L. R., 12 Eq. 455.

as the "remainder" of something else, no part of which was in the S. bonds. (b) The degree of comprehensiveness must in each case be decided by the context.] (c)

Other cases may be adduced, in which the general residue of a testator's personal estate has been held to pass under very informal words held to pass general residue. As in *Leighton v. Bailie*, (d) where a testatrix made the following endorsement on one of her testamentary papers: "I think there will be something left after funeral expenses, &c., paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed the sum of £500 to W. B. It was held by Sir J. Leach, M. R., that under the endorsed memorandum, W. B. was the general residuary legatee.

[Again, in *Hodgkinson v. Barrow*, (e) a testator, having several children by different marriages, gave his real and personal estate to trustees, upon trusts that did not exhaust the whole interest, but "confiding in them to fulfill any memorandum he might attach" to his will: by a codicil, after reciting the settlement made on his second marriage, "he directed that whatever sums might come to the children of that marriage, or the children of his former marriage, with the exception of such sums as might come in right of their respective mothers, that his trustees would take the whole of his real and personal property into their consideration, and have an estimate made"—"and his will was to divide to every child its due share and proportion, also taking into consideration" moneys received by the children by way of advancement. Lord Cottenham held, reversing the decision of *the V. C., that the reversionary interest in the real and personal property passed by the codicil.

And in *In re Bassett's Estate*, (f) where legacies were given, and the will then went on, "after these legacies and my funeral expenses are paid, I leave to my sister A without any power or control of her husband; in case of her death to be equally divided amongst her children or grand-children:" it was held that this was a good gift of the residue.]

(b) *Patrick v. Yeatherd*, 33 L. J., Ch. 286. "In S. bonds" might here be read as *falsa demonstratio*.
 (c) *Langdale v. Whitfield*, 4 K. & J. 436.]

Hopkinson, 18 L. J., Ch. 188; *Wiggins v. Wiggins*, 2 Sim. (N. S.) 229; *Duhamel v. Ardovin*, 2 Ves. 162.

(e) 2 Phil. 578.]

(f) L. R., 14 Eq. 54.

(d) 3 My. & K. 267; [see *Surtees v.*

*CHAPTER XXIV.

FORCE AND EXTENT OF PARTICULAR WORDS OF DESCRIPTION.

The most comprehensive words of description applicable to real estate are *tenements* and *hereditaments*; as they include every species of realty, as well corporeal as incorporeal. (a)

"Tenements and hereditaments," include what.

The word "lands" is not equally extensive; for though, generally, it includes as well the surface of the ground as every-thing that is on and under it, as houses and other build-ings, (b) mines, &c., yet it seems that the term will not, *proprio vigore*, comprehend incorporeal hereditaments, as advowsons, tithes, &c., unless there is no other real estate to satisfy the words of the devise (a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial.) Thus, it seems that if a man devise all his lands in A and he has no other real estate there than tithes, they will pass. (c) So if he devises a certain manor, and has only a fee farm rent issuing out of it, such rent will pass. (d)

"Lands."

But though a devise of *lands* will, unaided by the context, carry *houses*, (e) or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses the term in contradistinction to *house*.

Whether it includes houses.

As where (f) A having a messuage at L. and a messuage and lands at W. devised his house at L. with all other his lands, meadows, pastures, with their appurtenances, lying in W., the house at W. was held not to pass.

The observation is equally applicable to other words of description,

[(a) Co. Lit. 6 a, 19 b, 20 a, 154 a.]

(b) Ewer v. Heydon, Moore 359, pl. 491.

(c) See Ritch v. Sanders, Styles 261.

(d) Inchley v. Robinson, 2 Leon. 41, pl. 57. [That a rent-charge or rent-seck

will not generally pass by devise of "lands," see West v. Lawday, 11 H. L. Cas. 375, *per cur.*

(e) Co. Lit. 4 a.]

(f) Heydon's Will, 2 And. 123; Cro. El. 476, 658 (Ewer v. Heydon.)

any of which may be diverted from their ordinary signification, by being placed in contrast or opposition to others. (*g*)

*The word *premises* properly denotes that which is before mentioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers. (*h*) Thus, (*i*) where a testator devised a certain messuage and the furniture in it to A for life, and after A's decease, gave the said messuage *and premises* to B, the latter devise was held to carry the furniture as well as the messuage to B, on the ground that the word *premises* included all that went before. [But the word is vulgarly used, without reference to what is before mentioned, in the general sense of houses, land and the like; and it was said by Wilde, C. J., (*k*) that a gift of premises at A would pass land there.]

"Messuage" includes curtilage, garden, and orchard.

The word *messuage* has been variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

In an early case (*l*) it is laid down, that the grant of a messuage did not include a garden, but was confined to the house, "and the circuit thereof," and it was thought that the words "messuage or tenement" must receive the same construction, the word "tenement" being in such case used as synonymous with messuage; it was said, however, that it would have been otherwise if the expression had been messuage *and* tenement: indeed, one of the judges (Weston) expressed an opinion,

(*g*) See *Hockley v. Mawbey*, 1 Ves., Jr., 143; and *Doe d. Ryall v. Bell*, 8 T. R. 579, stated *post*.

(*h*) *Doe d. Biddulph v. Meakin*, 1 East 456. This doctrine was advanced in the judgment, and is indeed unquestionable; but the case did not turn precisely on the question. A devised a messuage or tenement, lands, buildings and premises, then in his own possession, and all other his real estate whatsoever, to his wife for life. And after her decease, he devised *the said messuage or tenements, buildings, lands and premises*, to his son W. in fee. The question was, whether the devise to W. included all that was given to the wife, or only the premises in his own occupation; and it was held, that it included all. The point, therefore, was not so much, whether the word "premises" included the whole

antecedent subject, as whether the testator, having used precisely the same words as those by which he had described the property in his own occupation, was not to be understood to mean to confine the devise in question to that property. If the devise were not so restrained, there were other words sufficient to carry the reversion in dispute, without calling in aid the word *premises*.

(*i*) *Sanford v. Irby*, [4 L. J., Ch. (O. S.) 23,] *cor.* Lord Gifford, M. R.; [see *Doe d. Bailey v. Sloggett*, 5 Exch. 107.

(*k*) *Doe d. Heming v. Willetts*, 7 C. B. 709; and see *Ross v. Veal*, 1 Jur. (N. S.) 751; *Lethbridge v. Lethbridge*, 3 D., F. & J. 523; *Hibon v. Hibon*, 32 L. J., Ch. 374, 9 Jur. (N. S.) 511.]

(*l*) *Moore* 24, pl. 82, [Dal. 29.

that a garden would pass by the name of a messuage or tenement, if they had been held together; [and in *Carden v. Tuck*, (*m*) a devise of a messuage was held to include the garden as well as the curtilage, (*n*) the garden being, as was said, as well for necessity as pleasure. So, in *Smith v. Martin*, (*o*) it was held that a *garden might be said to be parcel of a house, and by that name would pass in a conveyance.]

In *Hearn v. Allen*, (*p*) two acres of land [occupied with the messuage, but distant four miles from it,] were held *not* to pass under a devise of a messuage *cum pertinentiis*. On the other hand, in *Gulliver d. Jefferies v. Poyntz*, (*q*) two closes of meadow and six acres of arable land were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, &c., that stand upon or belong to the said messuages." The property had, it seems, been conveyed to the testator by the description of "a messuage or tenement with the appurtenances;" but it is clear, that extrinsic evidence of this nature was inadmissible to enlarge the established import of the words of the devise. (*r*) The influence which this circumstance appears to have had in the determination certainly weakens its authority, and it is probable that the same construction would not now be adopted. At this day, indeed, the distinction suggested in the early cases (*s*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on; (*t*) and it is clear, that even "House."

(*m*) *Cro. El.* 89, 3 *Leon.* 214, pl. 283
(*Chard v. Tuck.*)

(*n*) As to what is a curtilage, see *Marson v. London, Chatham and Dover Rail. Co.*, *L. R.*, 6 *Eq.* 101.

(*o*) 2 *Saund.* 400; see also *Hill v. Grange, Plowd.* 170 a; *Bettisworth's Case*, 2 *Rep.* 32 a. It has been held that "house" in § 92 of the *L. C. act* includes all that would pass by the grant of a "house"—includes therefore a garden, though partly used for trade purposes, *Salter v. Metropolitan Rail. Co.*, *L. R.*, 9 *Eq.* 432, (nursery garden,) but not if wholly so used, *Falkner v. Somerset and Dorset Rail. Co.*, *L. R.*, 16 *Eq.* 458 (market garden.) See also *Grosvenor v. Hampstead Junction Rail. Co.*, 1 *De G. & J.* 446; *Fergusson v. Brighton Rail. Co.*, 33 *Beav.* 105, aff. 33 *L. J.*, *Ch.* 29; *Steele v. Midland Rail. Co.*, *L. R.*, 1 *Ch.* 275; *Richards v. Swan-*

sea Improvement Com., 9 *Ch. D.* 425.]

(*p*) *Cro. Car.* 57; *S. C.*, *Litt. Rep.* 5,
nom. Kene v. Allen.

(*q*) 2 *W. Bl.* 726, 3 *Wils.* 141.

(*r*) *Doe d. Brown v. Brown*, 11 *East* 441, *ante* p. *417.

(*s*) *Thomas v. Lane*, 2 *Ch. Cas.* 26, *Keilw.* 57, where it is said that *messuage* extends to the curtilage, though not to the garden; but that *domus* comprises only buildings.

(*t*) See *Mr. Justice Ashurst's judgment* in *Doe d. Clements v. Collins*, 2 *T. R.* 502; [and *Co. Lit.* 5 b, where Lord Coke says, "By the grant of a messuage or house, *messuagium*, the orchard, garden and curtilage do pass; and so an acre or more may pass by the name of a house." See also *King v. Wycombe Rail. Co.*, 28 *Beav.* 104.]

the word message would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it. (u)

In *Doe d. Clements v. Collins*, (v) it was held, that under a devise of "the house I live in and garden,"¹ 1 stables and a yard, which were in a ring fence that enclosed the whole, and a coal pen which was on the opposite side of the road near the house, and both which were in the testator's own occupation, were included. The coal pen was used in his trade, as well as for the *purposes of his family. It was admitted, that the question as to the coal pen was doubtful; but, considering that it was in the testator's own occupation, was used by him partly for domestic purposes, and was annexed to no other tenement, the court thought it passed.

There is indeed a case, (x) in which a devise of the testator's house

(u) See *Roe d. Walker v. Walker*, 3 B. & P. 375; also *Shepp. Touchst.* 94.

(v) 2 T. R. 498; [*Ashurst, J.*, seems to treat the case as if the word "appurtenances" had been in the will, *Id.*, p. 502. See observations on the case by *Turner, L. J.*, *L. R.*, 1 Ch. 291.]

1. A devise of the house "now occupied by me," or "my house lot," will not include adjoining property occupied by tenants, *Brown v. Saltonstall*, 3 Metc. 423; *Jackson v. Sill*, 11 Johns. 201; *Jackson v. Moyer*, 13 Johns. 531; *Perkins v. Jewitt*, 11 Allen 9. Nor will a wood lot at a distance of half a mile be included in a devise of the "farm and buildings where I now live," *Allen v. Richards*, 5 Pick. 512. Nor will such a devise include a right of way over adjoining property of the testator, constituting a non-apparent and continuous easement, *Fetters v. Humphreys*, 4 C. E. Gr. (N. J.) 471; but see *Lansing v. Wiswall*, 5 Denio 213. In *Piper's Appeal*, 73 Penna. St. 112, a devise of a mill and "all the real estate in M. county and lot of land in Philadelphia now used with the mill property," was restricted to the real estate in M. county used with the mill property. See, too, *Bruck v. Tucker*, 32 Cal. 425. And a devise of "my home plantation" will not include town lots laid off from part

of it and occupied as such, *Den, Hampton v. Cowles*, 4 Dev. & Bat. 16. But where a devise is of "the land whereon I now live, containing — acres," the whole farm, though larger, will pass, *Den, Dodson v. Green*, 4 Dev. L. 488; and although part be separated from the rest, *Aldrich v. Gaskill*, 10 Cush. 155; and in general the description controls the quantity of land, *Bear v. Bear*, 13 Penna. St. 529; so a devise of "the farm on which A now lives" will include different parcels adjoining one another and used together, *Kendall v. Miller*, 47 How. Pr. 446; so "my plantation" has been held to include two tracts half a mile apart, used and cultivated together, *Bradshaw v. Ellis*, 2 Dev. & Bat. Eq. 20; so "homestead" will include all the land which testator used as and considered to be the farm upon which he resided, *Hopkins v. Grimes*, 14 Iowa 73. See, too, *Garrison v. Garrison*, 5 Dutch. 153, where all the part of "the Blair farm which is now owned by me * * * on the east side of the road" was held to pass a small adjoining piece formerly belonging to the farm and purchased by the testator after making his will. See also *Theobald on Wills* 22. And see note 6, p. 405.

(x) *Blackborn v. Edgley*, 1 P. W. 600, 2 Eq. Cas. Ab. 324, pl. 27.

at C. was held to include land ;² on the ground, it should seem, that the devisee was directed to be at the charge of house-keeping, servants' wages and coach-horses, to the number that the testator had maintained; and it appearing that he had a small piece of land, which he had employed to raise hay and corn for the house, and which was ploughed with the coach-horses. (y) The court, therefore, thought that as everything was to be carried on as it was in his lifetime, and the same style of living observed, the lands, the profits whereof had been used to be applied to the maintenance of the house, should continue to be so applied.

Case in which "house" was held to include land.

However strong these circumstances may be as affording conjecture, they seem not to amount to that species of evidence on which to found a judicial exposition of the testator's intention. (z) ["House" will include whatever is necessary for the convenient occupation of it, but not all that the occupier finds it convenient to occupy with it. (a)]

But where a testator directed his trustees to erect a mansion-house, and suitable offices fit for the residence of the owner of his estates (which were worth about £15,000 per annum), on some convenient spot, the question being whether this will authorized the formation of a garden and pleasure grounds; Sir L. Shadwell, V. C., said that, knowing something, as he did, of what the residence of a country gentleman ought to be, it would be the grossest of all possible absurdities if it were to be held that a bare mansion-house and offices, erected out of a muddy field, should be considered a fit residence for the owner of such an estate. And he thought there must of necessity be accommodation in the way of pleasure grounds, and a pretty approach in which every English eye took a delight. (b)

Direction to erect mansion-house held to include formation of suitable grounds.

So much for the comprehensiveness of the word house. The converse question is, what kind of tenement will satisfy this and *other similar terms. In *Doe d. Hubbard v. Hub-*

"House," "cottage," what amounts to.

2. It was held in *Rogers v. Smith*, 4 Penna. St. 93, that the devise of a "house" would carry with it the curtilage; so, too, in *Williams v. McComb*, 3 Ired. Eq. 450; so a "barn," the land necessary for its enjoyment, *Bennett v. Bittle*, 4 Rawle 339; and "all my land and mansion-house" will include unimproved land connected with the house, *Mitchell v. Walker*, 17 B. Mon. 66.

(y) The court assumed that there was a direction that the horses should continue to plough the lands; but the will, as stated in the report, contains no such clause.

(z) See 2 B. & P. 308.

[(a) *Steele v. Midland Rail. Co.*, L. R., 1 Ch. 275.

(b) *Lombe v. Stoughton*, 18 L. J., Ch. 400.

bard, (c) it was held, that the word "cottage" (defined by Lord Coke (d) to be a little house without land to it) was satisfied by a tenement partitioned off from a larger cottage and having a separate entrance, though not including an upper room under the same roof.]

It has been sometimes a question what will pass under the denomination of *appurtenances* to a messuage or house.³ [Strictly speaking, land cannot be appurtenant to a house (e) or to other land. (f) But in *Boocher v. Samford*, (g) where a testator devised "the tenement with the appurtenances in which H. B. dwelleth in Ebley," it was held, that lands that had been held at one rent with the house sixty years passed, though not strictly appurtenant.] And in *Doe d. Lempriere v. Martin*, (h) a devise of the testator's copyhold messuage, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., and then in his own possession, was held to include a small piece of land, being the site of several cottages pulled down by the testator, who had laid the ground open to his court yard, and then occupied it with the house, though his estate in the two was different.

But in a subsequent case, (i) a direction by the testator that his steward should enjoy his mansion-house *with the appurtenances*, for one year after his death, was held to extend to orchards, but not to fifty or sixty acres of land, which the testator had kept in his own hands with the house. And this construction was corroborated by the fact of there being, in another part of the same will, a devise of this property "with the lands and grounds," also "with the appurtenances," showing that the testator

Gardens, &c., held to pass as "appurtenances" to a house.

(c) 15 Q. B. 227.

(d) Co. Lit. 56 b. "A cottage is a small dwelling-house," *Doe v. Sotheron*, 2 B. & Ad. 638.]

3. In *Jackson v. White*, 8 Johns. 59, under the name of "appurtenances," pasture, orchard and other lands were held to pass; or whatever was used as appurtenance to a mill by the testator, *Blaine v. Chambers*, 1 Serg. & R. 169; so, too, right of way over, but not soil of, adjoining highway, *Leonard v. White*, 7 Mass. 6; half of an unopened avenue was however held to pass as an appurtenance in *Chestleman's Estate*, 1 Tucker 53; but not an adjoining tenement occupied by a

tenant, *Otis v. Smith*, 9 Pick. 293; nor a small court adjoining the house in front and used for light, air, drainage, passage, &c., *Eliot v. Carter*, 12 Pick. 436.

[(e) Plowd. 169 a, 170. *A fortiori* if one be freehold, the other copyhold, *Yates v. Clincard*, Cro. El. 704.

(f) Co. Lit. 121 b; 8 B. & Cr. 141; 6 Bing. 161.

(g) Cro. El. 113.]

(h) 2 W. Bl. 1148; but see *Hearn v. Allen*, Cro. Car. 57, 708.

(i) *Buck d. Whalley v. Nurton*, 1 B. & P. 53; see also *Harwood v. Higham*, Godb. 40.

had the distinction in view. Eyre, C. J., said if this had not been so, and if they had found a house situated in a park, which had been always occupied with it, being, as it were, an integral part of the thing, it might have proved the intention of the testator to pass the whole together.

This would be carrying the construction of the word very far; [and seems to have been put only for the sake of argument.] *It is not to be doubted, that whatever is necessary to the commodious enjoyment of the house will in general pass under the word "appurtenances;" (*k*) *a fortiori*, if then actually enjoyed with it by the person in whose occupation the house is described to be; though in some of the cases more weight has been given to this circumstance than it seems fairly entitled to. It is not likely that at this day the word would be carried beyond its ordinary acceptance. [It has a definite meaning, and though it may be enlarged by the context, the burden of proof lies on those who so contend. (*l*)

There is, however, a difference between the devise of a house and the *appurtenances*, and of a house with the *lands appertaining thereto*. It is clear, that by the latter expression ^{"Lands appertaining to" a house, &c.} some lands are intended, and therefore the primary sense of the word appertaining is excluded. Thus in *Hill v. Grange*, (*m*) it was held that the demise of a messuage, "with all lands appertaining thereto," comprised all lands usually occupied with or lying near to the messuage; for when "appertaining" was placed with the said other words, it could not be taken in any other sense, and therefore it should there be taken, not according to the true definition of it, because that did not stand with the matter, but in such sense as the party intended it. And in *Hearn v. Allen*, (*n*) the court, while holding that the lands there in dispute were not included by the term "*cum pertinentiis*," said it would have been otherwise if it had been "*cum terris pertinentibus*."]

The construction of the words "thereunto belonging," which

(*k*) See *Nicholas v. Chamberlain*, Cro. Jac. 121; *Hobson v. Blackburn*, 1 My. & K. 571; [for this purpose, however, the word is generally unnecessary, *Steele v. Midland Rail. Co.*, L. R., 1 Ch. 275. strued strictly;] *Smith v. Ridgway*, L. R., 1 Ex. 46, 331; also per Parke, B., *Physey v. Vicary*, 16 M. & W. 494.

(*l*) See acc. *Evans v. Angell*, 26 Beav. 202; *Lister v. Pickford*, 34 Beav. 576 (in both of which "appurtenances" was con- (*m*) *Plowd.* 170 a. (*n*) Cro. Car. 57, *ante* p. *779; see also *Gennings v. Lake*, Cro. Car. 168; *Higham v. Baker*, Cro. El. 16, per Anderson, C. J.

"Thereunto belonging." are not words of art, (o) has often come under discussion.

Thus, in *Ongley v. Chambers*, (p) where a testator devised the *rectory or parsonage of Minster, with the messuages, lands, tenements, tithes, hereditaments and all and singular other the premises *thereunto belonging*, with the appurtenances; it was held that, by the effect of these words, the devise operated on certain lands which had been purchased by the owners of the rectory between the years 1607 and 1632, and had been since uninterruptedly occupied with it, and had been in various leases described as belonging to the rectory; for though not, strictly speaking, appurtenant to the rectory, they had become, by unity of title and concurrent occupation, joined to the rectory, and might be taken in popular acceptance as belonging thereto. Lord Gifford, C. J., referred to several old cases and text books in which it was laid down that lands, which had been occupied with a house for ten or twelve or even five or six years, might pass as parcel of or as belonging to such house.

So, in *Doe d. Gore v. Langton*, (q) where a testator, in 1801, devised all his "manor or reputed manor of Barrow Minchin, in the county of Somerset, together with the mansion-house, called Barrow Court, thereto belonging, and the park; and also all and singular his freehold messuages, lands, tenements and hereditaments *thereunto belonging*, situate in the parish of Barrow Minchin and Barrow Gurney," to certain uses. The testator gave to his executors all arrears of rent which should be due from any tenant or tenants of his *estate in the parish of Barrow*, upon trust to lay out the same in repairing the farm-houses and buildings appurtenant thereto, and in draining the lands. The testator also charged two small annuities on *his estate at Barrow*. The question was, whether

Devise of
manor and
lands thereun-
to belonging.

(o) Per Pollock, C. B., *Maitland v. Mackinnon*, 1 H. & C. 607.]

(p) 8 J. B. Moo. 665, 1 Bing. 483; see also *Doe v. Holton*, 5 Nev. & M. 391, 4 Ad. & Ell. 76; [*Bodenham v. Pritchard*, 1 B. & Cr. 350 ("lands thereto belonging as now enjoyed by me;") with which cf. *Pollden v. Bastard*, L. R., 1 Q. B. 156, where a discontinuous easement over other property of the testator was held not to pass by devise of a cottage as now in the occupation of A. In *Marshall v. Hop-*

kins, 15 East 309, a house and nineteen acres of land, all held by the testator under one title, and which at a former period of his ownership had been, but at the date of the will were not, in one and the same occupation, were held to pass by a devise of "all that my messuage, dwelling-house or teneament, with all lands, hereditaments and appurtenances thereto belonging."]

(q) 2 B. & Ad. 680.

the devise comprised a farm, which had been purchased by the testator in 1800, and which was situate in the parish of Barrow Minchin and Barrow Gurney, and adjoined to and was in some parts intermixed with the ancient Barrow estate. Lord Tenterden, C. J., considered that the words "thereunto belonging" were to be referred to the manor, and not to the park. These words are, he observed, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or a field with reference to the ownership, we say it belongs to such a one, meaning thereby that it is the property of that person; (*r*) if with reference to any estate of a particular name, we say it belongs to such an estate, *as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in and a part of that parish or township; and so with reference to a manor, we say it belongs to such a manor, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word "part," and not in the strictly legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof. He adverted to the fact (which had been proved in evidence,) that the gamekeeper of the manor had, both before and after the purchase of the lands in question, been in the habit of shooting over them. Having regard to this circumstance, (which he considered important, as showing that the lands belonged to the manor in the popular sense to which he had alluded,) and having regard also to the circumstance, that the bequest of the rents in arrear to be expended in repairing and improving any part of the estate, and the charge of the annuities, would clearly comprise the lands in question, (which the testator could not intend to be united to the rest of the property for some purposes, and not for all,) the court came to the conclusion that the farm in question passed.

[In *Josh v. Josh*, (*s*) the question was what passed by the description of "the piece of land adjoining" a house and premises previously described; whether it comprised several con- "Thereto adjoining."
tiguous fields, each one situated beyond the other, and forming with the house and premises the whole of the testator's real property, or was limited to the single field next to the house and premises: and it was held to comprise the whole. Cockburn, C. J., observed that the

(*r*) In *Kennedy v. Keily*, 28 Beav. 223, a bequest of the lease of a house with all buildings belonging to *me* was held to pass stables occupied with the house by the testator though under a different title.
[(*s*) 5 C. B. (N. S.) 454.]

testator did not say the piece of *my land*, but simply the piece of land; and that the words "thereto adjoining" were as consistent with the larger construction as with the other; for the whole of the land was in the strictest sense adjoining, for it was all contiguous.]

The word *farm* is construed according to its obvious meaning, [as including houses, lands and tenements, (t) of every tenure. (u)

In determining what property is comprehended in the terms used to describe the subject of devise, frequent recourse is had to two rules of construction, one of which is expressed by the maxim *Falsa demonstratio non nocet*. "*Falsa demonstratio non nocet cum de corpore constat*," the other by the maxim "*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*."

*The first rule means that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only." (x) Thus, in *Day v. Trig*, (y) where one devised "all his freehold houses in Aldersgate street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass.

Devise of "freehold houses in A. street, London." The word freehold rejected.

So, in *Blague v. Gold*, (z) where a testator, having two houses in A., one called "the corner house," in the tenure of B. and N., the other adjoining thereto and in the tenure of H., devised "his house called 'the corner house' in A., in the tenure of B. and H.:" the testator having no house in the joint tenure of B. and H., it was held that the description by tenure was mere surplusage and might be rejected.

"House called 'the corner house' in A., in the tenure of B." The tenure rejected.

Again, in *Doe d. Dunning v. Lord Cranstoun*, (a) where a testator

(t) Co. Lit. 5 a.

nett, L. R., 6 Eq. 422.

(u) Doe d. Belasyse v. Lucan, 9 East

(z) Cro. Car. 447, 473.

448.

(a) 7 M. & Wels. 1; see also Welby v.

(x) Per Alderson, B., *Morrell v. Fisher*, 4 Exch. 591; see also Wigram on Wills, pl. 67.

Welby, 2 Ves. & B. 187; Den d. Wilkins v. Kemeys, 9 East 366; *Vicars Choral of Lichfield v. Eyres*, Sir W. Jo. 435, Cro. Car. 546, 2 Roll. Ab. 52, pl. 26. So in

(y) 1 P. W. 286; and see *Cox v. Ben-*

recited that one part of his *freehold* lands, namely, those lands which he held in the parishes of A, B and C, were held for a considerable period of time by his father's ancestors in the male line, bearing the name and arms of D, as hereditary proprietors of the same; he therefore devised "the *freehold* lands, which he held in the three parishes aforesaid," to M. The testator had lands in each of the three parishes named, answering to the given description in every respect except that in the parishes of B and C there were leaseholds only. Upon the principle stated above, the Court of Exchequer held that the leaseholds passed by the will.

Leaseholds
misdescribed
as freehold
held to pass.

In the application, however, of the principle contained in this rule, the courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the *facts of the case, that of two particulars of which the description is composed, each separately finds some corresponding subject, but] the one is applicable to a larger portion of the testator's property than the other, thereby raising the question whether the more limited term be restrictive of the other, [or expressive only of a suggestion or affirmation. It is a mere question of construction; for it is clear that, if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description.

Extension of
the rule.

Question
where parts of
the description
are not co-ex-
tensive.

Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his *farm* called A, or his *house* in a particular place, or his B estate, or the like, then, although he adds a clause to the effect that the farm, house or estate is in the occupation of a particular tenant, or is situate in a particular county, and it turns out that such clause is true only of a part of the farm, or house, or estate, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent of the testator.](b)

Limited term
rejected where
property is de-
scribed as an
entire subject:

England v. Downs, 2 Beav. 523, 536, where there was an assignment of all the household goods, and all other the effects of the assignor, the particulars whereof were stated to be set forth in an inventory thereunto annexed, and there was in fact

no inventory, it was held, the deed was not void for want of it, and that the chattels might be ascertained *aliunde*. See also Whateley v. Spooner, 3 K. & J. 542.

(b) See per Lord Ellenborough, Roe d. Conolly v. Vernon, 5 East 80.]

Thus in *Goodtitle d. Radford v. Southern*, (c) where a testator devised —as “my farm.” all that his farm, called Trogues farm, situate in the parish of D., *now in the occupation of A. C.* The question was, whether two closes, part of Trogues farm, but *not* in the occupation of A. C., passed by this devise. It was held that the devise comprehended the whole of Trogues farm, which was a plain and certain description, and was not affected by the defective description of the occupation.

So, in *Down v. Down*, (d) where A devised all his farm and lands, called Colt’s-foot farm, situate in or near the parishes of D., W. and T., *now on lease to Mary Field, at the yearly rent of £150.* It was held that a close of seven acres, called Williamspring, which was a part of Colt’s-foot farm, but was excepted out of Mary Field’s lease, as well as out of a subsequent lease granted by the testator to another person, passed; (e) the court *being of opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the occupation of Mary Field.

But though a devise of “my farm called A in the occupation of B” is not, under these circumstances, limited to that part of the farm which is in the occupation of B, yet perhaps it does not follow that the same construction would be given to a devise of “all my farm in the occupation of B called A.” In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of *Woodden v. Osbourn*, (f) where A, having lands called Hayes lands, which extended into two vills, Cokefield and Cranfield, devised all his lands in Cokefield called Hayes lands, to J. S., it seems to have been held that the part which was in Cranfield did

(c) 1 M. & Sel. 299; see also *Paul v. Paul*, 2 Burr. 1089, 1 W. Bl. 255; [*Whitfield v. Langdale*, 1 Ch. D. 61, as to “Hookland” and “Tickeridge.” In the same case it was held that a devise of a “messuage and lands called Claggett’s and Sieveland’s” carried the whole of Claggett’s farm, upon evidence that this farm included Claggett’s and Sieveland’s and a good deal more, *sed qu.* Qu. also as to the exclusion of the wood from Tickeridge.]

(d) 1 J. B. Moo. 80, 7 Taunt. 343.

(e) The farm consisted of about one hundred and seventy-two acres.

(f) Cro. El. 674; S. C., *nom. Tuttesham v. Roberts*, Cro. Jac. 22; and Lord Ellenborough’s judgment in *Roe d. Conolly v. Vernon*, 5 East 78. The principal point in the case in Croke seems to have been whether the Hayes lands, being so restricted in the devise to J. S., were subject to the same restriction in a subsequent devise of it as Hayes lands generally; and the decision, of course, was in the affirmative. As to words of description being narrowed by the effect of the general context, see *Doe d. Harris v. Greathed*, 8 East 91.

not pass. Unless a reference to locality be more restrictive than a reference to occupation, (*g*) this case seems to warrant the distinction suggested. [It is to be observed, however, that Popham, C. J., and Gawdy and Yelverton, JJ., went on to say, that if the words had been "all his lands called Hayes lands, in Cokefield," (thus reversing the order,) nothing had passed but the land in Cokefield. (*h*) And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation is discountenanced by the case of *Doe d. Beach v. Earl of Jersey*. (*i*)

Next, with regard to the devise of a "house," it was decided in *Chamberlaine v. Turner*, (*k*) where a testator devised "the house or tenement wherein W. N. dwelt, called the White Swan, in Old street," and it appeared that W. N. occupied only the entry or alley of the said house and three upper rooms in the *same, divers other persons occupying other parts, that the whole house passed. (*l*)

Where subject of devise described as "a house" followed by terms applicable to part only.

An instance of the similar use and effect of the word "estate" is presented by *Doe d. Beach v. Earl of Jersey*, (*m*) where A devised all that her "Britton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereunto belonging, and of which the same consists." In a subsequent part of the will, after describing another estate, she added, "which, as well as my B. F. estate, is situate, lying and being in the county of Glamorgan." It turned out that part of the B. F. estate was situate in the county of Brecon; but it was found by special verdict that the whole had been known by the name of the Britton Ferry estate for fifty years before the death of the testatrix; and it was held that the whole passed. (*n*)

(*g*) See *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550, stated *infra*.

[(*h*) In *Stukeley v. Butler*, Hob. 171, it is said "it is vain to imagine one part before another; for though words can neither be written nor spoken at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence;" see also *Doe v. Galloway*, 5 B. & Ad. 50.

(*i*) 1 B. & Ald. 550, 3 B. & Cr. 870.

(*k*) Cro. Car. 129. The court seems to have treated the case as if the words had been "in the occupation of W. N.," which

might perhaps be restrictive, where the terms actually used would not; see per Lord Hardwicke, 3 Atk. 9; see also *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227, per Erle, J., and Lord Campbell, C. J.

(*l*) See also *In re Midland Rail. Co.*, 34 Beav. 525, stated *ante* p. *334; *Hibon v. Hibon*, 32 L. J., Ch. 374, 9 Jur. (N. S.) 511 ("house and premises.")

(*m*) 1 B. & Ald. 550.]

(*n*) Observe the agreement between the principle of these cases and that of those which are cited in connection with the subject of uncertainty, as illustrative of

The same principle is illustrated by *Hardwick v. Hardwick*, (o) where the devise was of "the messuages, lands and premises called the Dyffrydd, situate in the parish of K., now in the occupation of E.;" although part of "the Dyffrydd" was not in the parish of K., and other part was not in the occupation of E., yet the whole was held to pass: and by *Travers v. Blundell*, (p) where a testator, having under his father's will power to appoint "all that part of R.'s estate purchased by me, situate at P., consisting of" six specified closes, appointed "all that part of the property comprised in my late father's will as is therein described as that part of R.'s estate purchased by my father, situate at P., consisting of," and then specifying four only of the six closes; it was held that all six were well appointed. The appointment was of a certain *corpus* or subject as described by the father's will, and representing that description to be in certain specified terms; one of the terms specified differed from the corresponding term of the description actually contained in the father's will, and, not being needed for the ascertainment of the subject, was rejected as *falsa demonstratio*.

A different construction, however, prevailed in *Hall v. Fisher*, (q) where a testator, by will dated 1841, devised "all that *Different construction in Hall v. Fisher.* freehold farm called the Wick farm, in Headington, containing two hundred acres or thereabouts, occupied by William Eeley as tenant thereof to me." It appeared that the person from whom the testator claimed the Wick farm, which was all freehold, had sold a small portion of it, but had continued to occupy it as part of the Wick farm, under a demise from the purchasers, and to treat it as such, and that the testator had let the whole to W. Eeley. There was therefore a sufficiently certain description, in accordance with the testator's undoubted intention, and corresponding in every particular but the word freehold with the actual state of the property; but Sir J. K. Bruce, V. C., said he could not view the case as one of *falsa demonstratio*; that if the word "freehold" had been omitted, the probability was, the leasehold in question would have been held to pass; but that there was a subject here which properly answered the description given in the will. This case goes to show that words descriptive of tenure, and

the rule that a false addition does not vitiate a devise; see also *Doe v. Nickless*, 4 Jur. 660.

(o) L. R., 16 Eq. 168, explaining *Pedley v. Dodds*, L. R., 2 Eq. 819.

(p) 6 Ch. D. 436. See also *Cunningham v. Butler*, 3 Gif. 37; and cf. *West v. Lawday*, 11 H. L. Cas. 375.

(q) 1 Coll. 47. See also *Emuss v. Smith*, 2 De G. & S. 722, stated *ante* p. *328, n.

forming the primary part of the description, are more restrictive than those which describe locality or occupation. But the case has been questioned.] (r)

As a subsequent reference to the occupancy does not limit a devise of a farm by name to the lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of "my Trogues farm, in the occupation of A," lands of another farm in the occupation of A would unquestionably not pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel. (s)

Subsequent
reference to
occupancy
does not ex-
tend devise.

[Parts of a description which, if the will contained no other devise than that to which they belong, would be rejected as *falsa demonstratio*, sometimes derive a restrictive force from another devise in the same will, with which they would otherwise stand in contradiction. Thus, in *Higham v. Baker*, (t) where a testator devised his farm called Whiteacre, and the lands to the same belonging, then in the tenure of W., to A., and devised his farm called Blackacre, and the lands to the same belonging, to B.; and it appeared that there were one hundred acres of land belonging to Whiteacre, and no land belonging to Blackacre, but that the *testator had let Whiteacre with sixty acres of the land belonging to it, and the remaining forty acres with Blackacre: it was clear that only so much of the land belonging to Whiteacre as was in the tenure of W. was devised to A.

Words not
rejected, if
required to
prevent the
devise being
contradictory
to another.

So, in *Press v. Parker*, (u) where a testator devised to A. his messuage in the parish of H., wherein he then lived, with the yard, back estate and premises thereunto belonging, *part of which was in his (the testator's) own occupation*, and other part whereof was in the occupation of C. and M.; and he devised to B. his front messuage in K. street, in the parish of H. aforesaid, with the appurtenances, *then in the occupation of E.*, with a right of way to the yard adjoining, and the use of the pump, &c., in the yard. The question was whether a coal-cellar passed to A. or B. It was within the range of the house devised to B., but was in the

Whether de-
vise passed all
that was occu-
pied by the
person de-
scribed.

(r) By Lord Selborne, L. R., 16 Eq. & Sel. 550; [*Hall v. Fisher*, 1 Coll. 47; 177, who also (Ib.) questions *Stone v. Doe d. Renow v. Ashley*, 10 Q. B. 663. *Greening*, 13 Sim. 390, which is shortly stated *ante* p. *676, n.] (t) Cro. El. 16.] (u) 10 J. B. Moo. 158, 2 Bing. 456.

(s) See *Doe d. Tyrrell v. Lyford*, 4 M.

occupation of the testator, who had put up a partition between it and B.'s premises, the entrance being from his own house. It was held that the cellar, being in the testator's occupation, passed to A.; the intention, it was thought, being manifest to give to A. whatever was so occupied. [But Best, C. J., said if the latter devise had stood alone, the words *in the occupation of E.* might have been deemed mere words of description.]

In connection with the subject of the construction of words referring to occupancy, it may be here observed, that in *Doe d. Templeman v. Martin*, (x) where a testator devised all his messuage, the Ark cottage, gardens and lands at S., rented to Mrs. S., *and others*; and it was attempted to confine the devise to a particular property at S., forming a distinct purchase made by the testator, of which Mrs. S. was the principal occupant; the devise was held to comprise all the land situate at S., by whomsoever rented, including a considerable farm, in the occupation of a tenant, not Mrs. S.; the suggestion, that the testator could scarcely mean to describe a large property in such terms (omitting the name of the tenant,) not being allowed to prevail against the clear import of the words of the will.

It is to be observed that in the foregoing cases where terms of occupancy [or locality] were not allowed by reason of their inapplicability to particular portions of the subject to exclude them from the devise, those portions bore but a small proportion to the whole. [But in *Whitfield v. Langdale*, (y) an erroneous statement *of the acreage as being "by estimation eighty acres, more or less," was not permitted to exclude any portion of the "farm" devised, although the real quantity was one hundred and seventy-five acres, and as to a small part of the disputed lands there was a mistake also made in the locality.

Limited term rejected though applicable to large proportion.

But, secondly, if] the property is not described by a name comprehending the whole, (z) a different rule seems to prevail: [for it is a well-settled canon of construction,] that where a given subject is devised, and there are found two species of property, the one technically and precisely correspond-

Devise of property not described as a whole is confined to what exactly answers it.

(x) 4 B. & Ad. 770; [conf. *Chester v. Chester*, 3 P. W. 55, where an attempt was made to limit the sense of "elsewhere" by reference to previously specified places.

(y) 1 Ch. D. 61.

(z) That this circumstance, however, is not absolutely essential, but that the same result may follow from a precise description of the property, either by the names of the closes or by their metes and bounds, appears from *Doe d. Smith v. Galloway*,

ing to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

As in *Roe d. Ryall v. Bell*, (a) where a testator devised all his copyhold estates situate at G., *which he became entitled to on the decease of his father*. The fact was, that on the death of his father, the testator had taken possession of two copyhold estates at G.; one which his father had in his lifetime surrendered to him in fee, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. It was held, that as the latter estate was sufficient to satisfy the words, the former did not pass. (b)

Again, it has been held, (c) that a devise of lands at W., in the parish of C., "*which I purchased of S.*," did not include lands not at W., though purchased of S. in the parish of C. And in *Roe d. Conolly v. Vernon*, (d) a surrender to the use of the testa^{*}tor's will of all the lands, &c., situate in certain specified places, which he held of the manor of W., *being of the yearly rent to the lord in the whole of £4, 10s., 8½d., and compounded for*, was held to be confined to copyholds compounded for, though the rent specified exceeded the amount of rent paid for the compounded copyholds, but did not correspond with the amount paid for the whole.

So, in *Doe d. Parkin v. Parkin*, (e) where a testator, seized of a house and five acres of land in his own occupation, and of an inn and

5 B. & Ad. 43. *E conv.*, a particular description of parcels will restrict general terms, *Griffiths v. Penson*, 9 Jur. 385; *Maitland v. Mackinnon*, 1 H. & C. 607.]

(a) 8 T. R. 579; see also *Wills v. Sayers*, 4 Mad. 409; [*Doe d. Gillard v. Gillard*, 5 B. & Ald. 785; and see the rule exemplified in cases treated of *ante* p. *423; but see *Doe d. Newton v. Taylor*, 7 B. & C. 384, where a devise by A of her moiety of all her late father's messuages, &c., situate, &c., was held to extend as well to lands which had been the property of the father, and had been devised by him to a granddaughter, from whom they had descended to the testatrix, as to those which had descended to her immediately from him. In this case, the terms

used were equally applicable to both properties.

(b) See also *Wilkinson v. Bewicke*, 1 Eq. Rep. 12.] But a devise of lands, which the testator had from time to time "purchased," has been held to apply to lands which he had received in exchange, and not (as contended) to be confined to those which he had bought with money; the word "purchase" admitting, it was considered, of application to what was purchased for money or lands, *Doe d. Meyrick v. Meyrick*, 1 Cr. & M. 820.

(c) *Doe d. Tyrrell v. Lyford*, 4 M. & Sel. 550.

(d) 5 East 51.

(e) 5 Taunt. 321; [doubted in *White v. Birch*, 36 L. J., Ch. 174, *sed qu.*]

nine acres of land in the same place, not so occupied, devised all his messuages, tenements, lands, grounds, hereditaments and premises situate at or in the township of A, in the parish of B, and then in his own occupation, with the appurtenances, to certain uses, the court held that these words were clearly restrictive, and, consequently, that the inn did not pass.

In *Pullin v. Pullin*, (*f*) a testator, reciting that he was seized in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds within and holden of the manor of the Prebendary of Islington, *and all which lands, &c., were subject to a mortgage thereof made by him to R.*, (minutely referring to the mortgage,) gave and devised all his said freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, *not in mortgage to R.*, did not pass under this devise, but were included in a general devise in a subsequent part of the will of the residue of his freehold, copyhold and leasehold estate; the court being of opinion that the testator intended to confine the former devise to the property in mortgage to R. It seems that a contrary construction would have left the residuary clause nothing to operate upon; but this circumstance was not relied on, and seems indeed entitled to little weight, as the clause embraces copyholds as well as freeholds, and the testator had no copyholds except those in mortgage. The testator's expressions certainly indicated that he considered the mortgage as extending over the whole subject devised.

[And in *Morrell v. Fisher*, (*g*) where a testator devised "all his leasehold farm-house, homestead, lands and tenements at Headington, held under Magdalen College, Oxford, and then in the possession of T. B. as tenant to him," it was contended, that two pieces of land at Headington, containing together twelve acres and being leasehold, held of the college, but not in the possession of T. B., passed by this devise. But the Court of Exchequer were of a contrary opinion, there being other lands which fully answered the description.]

This principle is applicable [to descriptions of property by its tenure, as freehold, copyhold or leasehold; (*h*) and generally to all terms of

(*f*) 10 J. B. Moo. 464, 3 Bing. 47; see also *Wilson v. Mount*, 3 Ves. 191.

(*g*) 4 Exch. 591; and see *Homer v. Homer*, 8 Ch. D. 758, (land at Stock Green.)

(*h*) *Doe v. Brown*, 11 East 441; *Quen-*

nell v. Turner, 13 Beav. 240. But where besides a fee simple estate in one part and a leasehold interest in a second part of a block of buildings in A street and B court, a testator had in a third part of the same block a leasehold interest in posses-

the description of property, personal (*i*) as well as real, but it] has most frequently been applied to terms of local description. Thus, if a testator have property *in*, and property *contiguous* to a particular street, parish or county, it is clear that a devise of houses or buildings in that street, parish or county will carry the former to the exclusion of the latter. (*j*) [So in *Webber v. Stanley*, (*k*) where a ^{*Webber v. Stanley.*} testatrix first charged her Welsh estates with a sum of money as “an addition to her Tedworth estates thereafter devised,” then gave her mansion-house at Tedworth, in the county of Hants, and all her manors, farms, lands, &c., in the county of Hants, devised to her by her husband (subject to the annuities charged thereon by his will,) and all other her hereditaments in the county of Hants, “all which hereditaments in the county of Hants were thereafter described as her Tedworth estates,” to uses in strict settlement, and she subsequently referred to “her *said* Tedworth estates:” it appeared that the husband, being owner of property in Hants and Wilts, together known as “the Tedworth estate,” had devised to the testatrix all his estates at or near Tedworth, charged with certain annuities: it also appeared that there was only one manor in Hants, but several in Wilts, that some of the farms of “the Tedworth estate” lay partly in one county and *partly in another, and that the charges thrown on the devised property were or might become out of all proportion to the value of the Hants property. It was held in C. P. that the words “in the county of Hants” were not *falsa demonstratio*, but confined the devise to lands in that county. Erle, C. J., delivered judgment and “laid

sion, and (subject to an intermediate reversionary term) the ultimate reversion in fee; and devised his “freehold messuages in A street and B court;” it was held that everything passed in which he had the fee, and that as he had the fee in the third part, although he had another sort of interest in it besides, yet it passed, being sufficiently denoted as the thing intended, *Mathew v. Mathew*, L. R., 4 Eq. 278.

(*i*) *Ridge v. Newton*, 2 D. & War. 239; *Quennell v. Turner*, 13 Beav. 240; *Oakes v. Oakes*, 9 Hare 666 (but as to “shares” in a company being identical with “stock,” see now *Morrice v. Aylmer*, L. R., 10 Ch. 148, 7 H. L. 717; *Maybery v. Brooking*,

7 D., M. & G. 673; *Slingsby v. Grainger*, 7 H. L. Cas. 273; *Gilliat v. Gilliat*, 28 Beav. 431; *Ex parte Kirk*, 5 Ch. D. 800.]

(*j*) See *Doe d. Browne v. Greening*, 3 M. & Sel. 171; [*Pogson v. Thomas*, 6 Bing. N. C. 337; *Smith v. Ridgway*, L. R., 1 Ex. 46, 331; *Evans v. Angell*, 26 Beav. 202; *Lister v. Pickford*, 34 Beav. 576. But where a house, with the appurtenances, is described to be in a certain place, lands *quasi* appurtenant to the house may pass, though not in that place, *Boocher v. Samford*, Cro. El. 113; and see *Moser v. Platt*, 14 Sim. 95.

(*k*) 16 C. B. (N. S.) 698, virtually overruling *Stanley v. Stanley*, 2 J. & H. 491, on same will.

down the law with a clearness and authority which cannot be strengthened or added to:" (k) there was a property which every part of the description fitted, and on which every word of it had full effect: if the testatrix had devised "her Tedworth estates" simply, that would have sufficed; but that phrase was never used by her without referring to the definition (her "said" Tedworth estates,) which confined it to property in Hants. As to the word "manors" (in the plural,) it occurred only in a sweeping general clause; and as to the charges, a similar disproportion had been disregarded in *Doe d. Templeman v. Martin*; (l) and such considerations could not outweigh the clear words of the devise.]

So, in *Doe d. Ashforth v. Bower*, (m) where a testator devised all his messuages, tenements or dwelling-houses, and buildings, situate *at, in or near* Snig Hill, in Sheffield, which he had lately purchased from the Duke of Norfolk. The testator had six houses at Sheffield, all purchased from the duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Snig Hill, and the remaining two about four hundred yards therefrom. The testator had redeemed the land tax for all the houses by one contract. It was held, that the devise did not comprise the two latter houses, part only of the description applying to them, and *there being other houses to which the whole of the description did apply.*

Description applied to a subject not strictly falling within it, for want of a more appropriate one.

But if the testator had no property in the street named, a contiguous property may pass. Thus, in *Doe d. Humphreys v. Roberts*, (n) where a testator devised all that his messuage or dwelling-house, with the appurtenances, situate in High street, in the town of Holywell, wherein his mother inhabited, and nearly opposite to the White-horse Inn, together with the shop adjoining the said messuage, *and all and every his buildings and *hereditaments in the same street*, to A. It appeared that the testator had only one house in High street, and that was occupied by his mother; but he had two cottages in a lane called Bakehouse lane,

(k) Per Willes, J., in *Smith v. Ridgway*, L. R., 1 Ex. 332.

(l) 4 B. & Ad. 771.]

(m) 3 B. & Ad. 453. [See also *Attwater v. Attwater*, 18 Beav. 330. The case of *Newton v. Lucas*, 6 Sim. 54, is generally cited in support of the same position; but the final decision was given,

under the particular circumstances, in favor of the greater comprehensiveness of the devise, 1 My. & Cr. 391.]

(n) 5 B. & Ald. 407; [*Baddeley v. Gingell*, 1 Exch. 319; *Goodright d. Lamb v. Pears*, 11 East 58; *Nightingall v. Smith*, 1 Exch. 879; *Doe d. Campton v. Carpenter*, 16 Q. B. 181.]

behind the house, from which it was separated by a road wide enough to admit carriages; but there was no thoroughfare in the lane, and the only entrance to it was out of High street, under an arch a little below the testator's house. It was held that these cottages passed under the devise, the court relying much on the fact that the testator had no other property which could answer to that part of the description; and there being, it was thought, a clear intention to pass some property in the street in addition to the house; and as there was no access to them but from the street, it was considered that the cottages might, without much impropriety, be described as situate in the street.

It is observable, that if the cottages in question had not passed under this devise, there was a general clause which would have comprised them, so that the construction was not induced by an anxiety to avoid intestacy.

It is clear, however, that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not pass;⁴ though the result be (the will being subject to the old law) to suppose the testator to make a devise which could have no effect. (o)

Devise of lands in one county not applied to lands in another county.

And though a testator may show by the context of his will, that he uses a local appellation in a peculiar and extraordinary sense, yet this hypothesis will not be adopted upon slight and equivocal grounds. Thus, where (p) the devise was of a testator's lands, "in Leverington," and it appeared that there was within the parish of this name a district called Leverington's Parson's Drove, for which a chapel of ease had long ago been endowed, and that the testator had lands in the

4. See *Hunter v. Hunter*, 17 Barb. 25, where a devise of all lands in the H. patent in Greene county was held to include only that part of the patent which lay in that county; but "my Patuxent plantation and land thereunto adjoining called Dorsey's Search, lying in B. county," was held to include the whole tract known as Dorsey's Search, though it lay partly in B. county and partly in A. county, *Dorsey v. Hammond*, 1 Harr. & J. 190; *Hammond v. Ridgely*, 5 Harr. & J. 245; *Emmert v. Hays*, 88 Ill. 11. And two stable lots, one in the rear of lot 89 and one in the rear of lot

90, will pass under the description of the two stable lots in the rear of lot 90, *Read v. Clarke*, 109 Mass. 82. See, too, *Martin v. Smith*, 124 Mass. 111, where "all the real estate I may die possessed of, which property is situate on the north side of North street," was held to pass property on the south side also.

(o) *Miller v. Travers*, 1 Moo. & Sc. 342, [8 Bing. 244; *Pogson v. Thomas*, 6 Bing. N. C. 337; *Moser v. Platt*, 14 Sim. 95.]

(p) *Doe d. Edwards v. Johnson*, 5 Nev. & M. 281.

parish which were within the chapelry, and lands in the parish which were not; it was contended, that this devise was to be confined to the latter, on the ground that the testator had himself distinguished the parish and the chapelry by describing himself to be "of Leverington," and one of his devisees as being of "Leverington Parson's Drove;" but the court held, that the lands in the parish, whether in the chapelry or not, passed by the devise; *Lord Denman observing, that though if the description of locality had been "Leverington's Parson's Drove," that would have been exclusive of every other part of the parish; yet the use of the larger term did not exclude the less.

[But in a case (q) where a man was seized of land in a vill and in two hamlets of the same vill, and devised all his lands being in the vill, and in one of the two hamlets by name, it was held that nothing of the land in the other hamlet should pass; for the naming of the one hamlet argued his intent fully.]

In regard to proximity, it has been decided that a devise of estates, ^{"Estates in or near L., near M."} situate "in or near Latchingdon, near Maldon," did not include a close which was situate four or six miles from Latchingdon, and *in* the town of Maldon. (r)

[Some minute but not unserviceable criticism was devoted to the words "at or within" in *Homer v. Homer*, (s) where, ^{"Lands at or within D."} among other devises of distinct properties, one "in the parish of" A, another "in the parish of" B, and a third "in the parish of" C, a testator devised "his manor of D, and all his messuages, tenements and lands *at or within* D then in the occupation of J. S." The testator had two farms, the greater part of which was in the parish (which was co-extensive with the manor) of D, but a small part of each was in an adjoining parish, separated from the bulk, in the one case by a hedge, (which was close to the church of D,) in the other by a high road. It was held by Fry, J., that the outlying portions did not pass by the devise. The true meaning of "at," when applied to a place which might include a farm, was, in his opinion, "within," *i. e.*, in the present case within the *parish* of D, and "at or within"

[(q) *Anon.*, 3 Dy. 261, pl. 27. In the parish of Street were two vills, viz., Street and Walton; by fine levied of "all his lands in Street," land in Walton did not pass, *Stock v. Fox*, Cro. Jac. 120. But this is explained to have been because the law then took notice only of civil, not

(unless named) of ecclesiastical, divisions, 4 Crui. Dig., p. 265.]

(r) *Doe d. Dell v. Pigott*, 1 J. B. Moo. 274, 7 Taunt. 552; see also *Doe v. Bower*, 3 B. & Ad. 453.

[(s) 8 Ch. D. 758.]

meant "at," that is to say, "within." But his decision was reversed by the L. JJ., who held that D meant the place so called, not the parish of D. They thought it would be an inaccuracy in language to speak of houses or lands "at" a place the bounds of which were at the same time expressly or impliedly indicated, *e. g.*, "at" a county, or "at" a parish: but that "at" was the appropriate preposition when speaking of lands with reference to localities as to which no such bounds were indicated, *e. g.*, "at" a town, or "at" a village; hence in the present case the proper *meaning of the words at or within, not the parish, but a more indefinite district taking its name from the church of D (there being in the parish no village, but only scattered houses); and that this was made plainer by the almost pointed absence from this particular devise of the word "parish." Thus "at or within" meant "whether at or within," and each word had its proper meaning.]

Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A, devises his manor, called South Dale, in A. Now, supposing that there was in A no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale; but if it should turn out that there was in A a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or in respect of wills operating under the present law, he might have contemplated the subsequent acquisition of a devisable interest in such manor.

[A devise of the rents and profits (*t*) or of the income (*u*) of lands passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. (*x*) And since the act 1 Vict., c. 26, such a devise carries the fee simple; (*y*) but before that act it carried no

Effect where there is property of another answering to the description.

Devise of "rents and profits" passes the land.

(*t*) Co. Lit. 4 b; Parker v. Plummer, Cro. El. 190; South v. Alleine, 1 Salk. 228; Doe d. Goldin v. Lakeman, 2 B. & Ad. 42; Johnson v. Arnold, 1 Ves. 171; Baines v. Dixon, Id. 42.

(*u*) Mannox v. Greener, L. R., 14 Eq. 456.

(*x*) Per Lord Cranworth, Blann v. Bell, 2 D., M. & G. 781.

(*y*) Plenty v. West, 6 C. B. 201; Man-

more than an estate for life unless words of inheritance were added. (z) But] where a testator, seized or possessed of a reversion in fee or for "Ground rent" years, to which rent was incident, devised or bequeathed held to include reversion. his "ground rent," not only the rent, but the reversion would pass; (a) as he was considered, when speaking of the ground *rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit.

[A devise of rents and profits includes an advowson; (b) and with it of course the right of presentation in case the living is vacant; unless the will devotes the "rents and profits" wholly to purposes which can be answered only by money or money's worth, as the augmentation of poor livings, (c) investment in lands, (d) or the maintenance of children, and accumulation of surplus; (e) in which case the right of presentation, not being the subject of profit, will result to the heir. If the living is full the future right of presentation may be sold for the purposes of the will, like any other fruit of property. (f)]

A devise of the "free use," (g) or of the "use and occupation" (h) of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction.] (i)

nox v. Greener, L. R., 14 Eq. 456. So an indefinite bequest of the income of personal estate passes the absolute interest, *Humphrey v. Humphrey*, 1 Sim. (N. S.) 536; *Watkins v. Weston*, 32 Beav. 238, 3 D., J. & S. 434 (leaseholds); *Buchanan v. Harrison*, 8 Jur. (N. S.) 965, 31 L. J., Ch. 74 (indefinite gift of income cut down by context); *In re Andrew's Will*, 27 Beav. 608 (gift of interest to A, and if he dies without issue, over.)

(z) *Hodson v. Ball*, 14 Sim. 571, and see *Belt v. Mitchelson*, *Belt's Suppl.* to *Vesey*, Sr., 227.]

(a) *Kerry v. Derrick*, *Moore* 771, *Cro. Jac.* 104; *Maundy v. Maundy*, 2 *Str.* 1020, 2 *Barn. K. B.* 202, *Cas. temp. Hard.* 142, *Fitz.* 70, 288; *Kay v. Laxon*, 1 *B. C.* 76; [and see *Ashton v. Adamson*, 1 *Dr. & War.* 198.

(b) *Earl of Albemarle v. Rogers*, 2 *Ves.*,

Jr., 477, 7 *B. P. C. Toml.* 522; *Sherrard v. Lord Harborough*, *Amb.* 167, per L. C.

(c) *Kensey v. Langham*, *Cas. temp. Talb.* 143.

(d) *Sherrard v. Lord Harborough*, *Amb.* 165.

(e) *Martin v. Martin*, 12 *Sim.* 579.

(f) *Cooke v. Cholmondeley*, 3 *Drew.* 1; *Cust v. Middleton*, 11 *W. R.* 456, 9 *Jur. (N. S.)* 709.

(g) *Cook v. Gerrard*, 1 *Saund.* 181, 186, e.

(h) *Whittome v. Lamb*, 12 *M. & Wels.* 813; *Rabbeth v. Squire*, 19 *Beav.* 70, 4 *De G. & J.* 406; *Mannox v. Greener*, L. R., 14 *Eq.* 456. "Occupation is not living and residing:" per Lord Eldon, *Fillingham v. Bromley*, T. & R. 536.

(i) *Maclaren v. Stainton* 4 *Jur. (N. S.)* 199, 27 *L. J.*, Ch. 442; *Stone v. Parker*, 29 *Id.* 874.]

It is clear that customary estates, held by copy of court roll, although not at the will of the lord as in the case of proper copyholds, will pass under the denomination of copyholds, and not, unless from special circumstances, under that of freeholds. (k)

Customary
freeholds pass
as copyholds.

Where (l) a testator, having a fee simple in possession in one moiety of lands called H., and the reversion in fee in the other, devised "All that my part, purpart and portion of and in the tenement called H.," with other lands, "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," it was held, that both moieties passed.⁵

Question
whether one
moiety or both
moieties
passed.

(k) *Roe d. Conolly v. Vernon*, 5 East 365; *Saunderson v. Stearns*, 6 Mass. 37; 83; *Doe d. Cook v. Danvers*, 7 East 299. *Hall v. Cushing*, 9 Pick. 395; *Cleggett v. Hardy*, 3 N. H. 148. See also *Parker's Appeal*, 61 Penna. St. 478. And see p. 354, u.

(l) *Doe d. Phillips v. Phillips*, 1 T. R. 105.

5. As to land passing by devise of "rents and profits" or "income," see *Den v. Manners*, *Spencer* 142; *Reed v. Reed*, 9 Mass. 372; *Earl v. Rowe*, 35 Me. 414; *Silknitters' Appeal*, 45 Penna. St. 365; *Drusadow v. Wilde*, 63 Id. 170; *Frances' Estate*, 75 Id. 220; *Den v. Humphreys*, 1 Harr. (N. J.) 27; *Diamant v. Lore*, 2 Vr. 220; *Kay v. Kay*, 3 Gr. Ch. (N. J.) 495; *Manning v. Craig*, Id. 436; *Bird v. Davis*, 1 McCart. 467. So, too, an unlimited bequest of the interest, or produce of a fraud, will amount to a bequest of the fund itself, *Garret v. Rex*, 6 Watts 14; *Van Rensselaer v. Dunkin*, 24 Penna. St. 252; *Craft v. Snook*, 2 Beas. 121; *Mason v. Trustees Tuckerton Church*, 12 C. E. Gr. (N. J.) 47; *Earl v. Grim*, 1 Johns. Ch. 494. But it is not so if it appears, from the context of the will, that the interest only was intended for the legatee, *Parker v. Moore*, 10 C. E. Gr. (N. J.) 228; *Dorr v. Wainwright*, 13 Pick. 323; *Giddings v. Seward*, 16 N. Y.

365; *Saunderson v. Stearns*, 6 Mass. 37; *Hall v. Cushing*, 9 Pick. 395; *Cleggett v. Hardy*, 3 N. H. 148. See also *Parker's Appeal*, 61 Penna. St. 478. And see p. 354, u.

6. A devise of "all that my farm near C., conveyed to me by the heirs of my deceased wife, and where my son T. now resides, containing about eighty-five acres," will include a farm of seventy-two acres on which T. lived, and which was conveyed to the testator by his wife's heirs, but not the adjoining tract of fourteen acres cultivated by T. with the seventy-two acres, but not so conveyed to the testator, although the scrivener testified to the insertion of the italicised words by a mistake of his own, *Griscom v. Evens*, 11 Vr. 403. Nor will a devise of "all my real estate situate in S.," carry after-acquired real estate which is not situate in S., *Blaisdell v. Hight*, 69 Me. 306. But parol evidence is admissible to explain what testator meant by "the dwelling-house and stable which my brother occupies, and the lot on which said house and stable stand," so as to exclude an adjoining shop, *Cleverly v. Cleverly*, 124 Mass. 314.

*CHAPTER XXV.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

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| <p>I. <i>General Rule in regard to Vesting.</i></p> <p>II. <i>Devise construed to be vested, notwithstanding Expressions of a contrary aspect.</i></p> <p>III. <i>Devise contingent by express Terms, notwithstanding absurd consequences.</i></p> | <p>IV. <i>Question, whether Contingency applies to one or all of several Limitations.</i></p> <p>V. <i>Vesting of Legacies charged on Land.</i></p> <p>VI. ————— <i>Personal Legacies.</i></p> <p>VII. ————— <i>Residuary Bequests.</i></p> |
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I.—The law is said to favor the vesting of estates ; (a)¹ the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply (*i. e.*, without any intimation of a desire to suspend or postpone its operation,) confers an immediately vested interest.

If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of postponing the vesting or point merely to the deferred possession or enjoyment.

[(a) The same principle prevails in the law of Scotland, *Carlton v. Thompson*, L. R., 1 Sc. Ap. 232; *Taylor v. Graham*, 3 App. Cas. 1287.]

1. *Savage v. Benham*, 17 Ala. 119; *Young v. McKinnie*, 5 Fla. 542; *Roberts v. Brinker*, 4 Dana 570; *Williamson v. Williamson*, 18 B. Mon. 329; *Richardson v. Wheatland*, 7 Metc. 171; *Shattuck v. Stedman*, 2 Pick. 468; *Bowers v. Porter*, 4 Pick. 198; *Ferson v. Dodge*, 23 Pick. 287; *Olney v. Hull*, 21 Pick. 468; *Dingley v. Dingley*, 5 Mass. 535; *Toms v. Williams*, 41 Mich. 552; *Hopkins v. Hopkins*, 1 Hun 352; *Moore v. Lyons*, 25 Wend. 119; *Griffin v. Lynch*, 16 Ind. 396; *Smith's Appeal*, 23 Penna. St. 9; *Manderson v. Lukens*, 23 Penna. St. 31;

Passmore's Appeal, 23 Penna. St. 381; *Letchworth's Appeal*, 30 Penna. St. 175; *Young v. Stoner*, 37 Penna. St. 105; *Lantz v. Trusler*, 37 Penna. St. 482; *Burd v. Burd*, 40 Penna. St. 182; *McClure's Appeal*, 72 Penna. St. 414; *McCall's Appeal*, 86 Penna. St. 254; *Collier's Will*, 40 Mo. 287, 321; *Watkins v. Quarles*, 23 Ark. 179, 191; *Bridgewater v. Gordon*, 2 Sneed (Tenn.) 5; *Cooper v. Hepburn*, 15 Gratt. 558. Where, in the construction of the clause, there is doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken, *Miller v. Keegan*, 14 Ind. 502; *Guyther v. Taylor*, 3 Ired. Eq. 323; *Hilliard v. Kearney*, Busb. Eq. 221.

It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A for life, and after his decease to B in fee, the respective estates of A and B (between whom the entire fee simple is parceled out) are both vested at the instant of the death of the testator, the only difference *between the devisees being, that the estate of the one is in possession, and that of the other is in remainder. ²

2. *Smith v. Bell*, 6 Pet. 69; *Hunter v. Green*, 22 Ala. 329; *Thrasher v. Ingram*, 32 Ala. 645; *Burd v. Burd*, 40 Penna. St. 182; *Patterson v. Hawthorn*, 12 Serg. & R. 112; *Bunch v. Hurst*, 3 Desaus. 286; *Buist v. Dawes*, 4 Strobb. Eq. 38; *Hays v. Gourley*, 1 Hun 38; *Bedell v. Guyon*, 12 Hun 396; *Coleman v. Hutchinson*, 3 Bibb 209; *Rawlings v. Landes*, 2 Bush 156; *Bowling v. Dobyons*, 5 Dana 434; *Adie v. Cromwell*, 3 Mon. 276; *Jackson v. Sublett*, 10 B. Mon. 467; *Phillips v. Johnson*, 14 B. Mon. 172; *Williamson v. Williamson*, 18 B. Mon. 329; *Nash v. Cutler*, 16 Pick. 491; *Abbott v. Bradstreet*, 3 Allen 587; *Brown v. Lawrence*, 3 Cush. 390; *Throop v. Williams*, 5 Conn. 98; *Rail v. Dotson*, 14 Sm. & M. 176; *Edwards v. Gibbs*, 39 Miss. 166; *Pike v. Stephenson*, 99 Mass. 188; *Valentine v. Borden*, 100 Mass. 273; *Hill v. Bacon*, 106 Mass. 578; *Barton v. Bigelow*, 4 Gray 353; *Fay v. Sylvester*, 2 Gray 171; *White v. Curtis*, 12 Gray 54; *Shattuck v. Stedman*, 2 Pick. 468; *Hall v. Tufts*, 18 Pick. 455; *Jones v. Waters*, 17 Mo. 587; *Thomas v. Anderson*, 6 C. E. Gr. (N. J.) 22; *Barker v. Wood*, 1 Sandf. Ch. 129; *Beatty v. Montgomery*, 6 C. E. Gr. (N. J.) 324; *Van Dyke v. Vanderpool*, 1 McCart. 198; *Green v. Howell*, 1 Vr. 326, affirmed 2 Vr. 571; *Campbell v. Rawdon*, 18 N. Y. 412; *Livingston v. Greene*, 52 N. Y. 118, affirming 6 Lans. 50; *Williams v. Conrad*, 30 Barb. 524; *Titus v. Weeks*, 37 Barb. 136; *Terrill v. Pub. Admr.*, 4 Bradf. 245; *Vanderheyden v. Crandall*, 2 Denio 9, affirmed 1 N. Y. 490, as *Wendell v. Crandall*; *Toney v. Shaw*, 3 Edw. 356; *Wimple v. Fonda*, 2 Johns. 288; *Jackson v. Merrill*, 6 Johns. 185; *Larocque v. Clark*, 1 Redf. 469; *S. C., Saxton's Estate*, 1 Tuck. 32; *Stowell v. Graves*, 2 T. & C. (N. Y. S. C.) 211; *Chapin v. Marvin*, 12 Wend. 538; *Buford v. Holliman*, 10 Tex. 560; *Taggart v. Murray*, 53 N. Y. 233; *Ackerman v. Gorton*, 67 Id. 63; reversing *Ackerman v. Hoyt*, 6 Hun 301; *Drake v. Laurence*, 19 Hun 112; *Hill v. Downes*, 125 Mass. 509.

In like manner a remainder to take effect on the marriage of the first taker is vested, *Farmers' Bank v. Hooff*, 4 Cranch C. C. 323; *Thrasher v. Ingram*, 32 Ala. 645; *Chappel v. Avery*, 6 Conn. 31; *Conwell v. Heavilo*, 5 Harring. 296; *Ferson v. Dodge*, 23 Pick. 287; *Birdsall v. Hewlett*, 1 Paige 32; *Manderson v. Lukens*, 23 Penna. St. 31; *Biddle's Appeal*, 69 Penna. St. 190. A devise to A for life and at his death to his children, *if he marry* and have children, was held to be a vested remainder, *Wright v. Shaw*, 5 Cush. 56. But see *Chapin v. Marvin*, 12 Wend. 538.

On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying

Devises of re-
versions and
remainders.

So in case of a "division" on the death of the first taker, *Ackerman v. Gorton*, 67 N. Y. 63; *Savage v. Benham*, 17 Ala. 119; *Thrasher v. Ingram*, 32 Ala. 645; *Rawlings v. Landes*, 2 Bush 156; *Jackson v. Sublett*, 10 B. Mon. 467; *Arnold v. Arnold*, 11 B. Mon. 81; *Field v. Hallowell*, 12 B. Mon. 517; *Dingley v. Dingley*, 5 Mass. 537; *Blanchard v. Blanchard*, 1 Allen 223; *Fairly v. Kline*, Penn. (N. J.) 755; *Demarest v. Hopper*, 2 Zab. 599; *In re Heaton*, 6 C. E. Gr. (N. J.) 224; *Tucker v. Ball*, 1 Barb. 94; *Hays v. Gourley*, 1 Hun 38; *McClure's Appeal*, 72 Penna. St. 414; *Sebastian's Estate*, 4 Phila. 236; *Harris v. Alderson*, 4 Sneed (Tenn.) 254; *Alexander v. Walsh*, 3 Head 493; *Bridgewater v. Gordon*, 2 Sneed (Tenn.) 5; *Hays v. Collier*, 2 Sneed (Tenn.) 585; *Michenor's Estate*, 30 Leg. Int. 336; or where the property is to be conveyed on the life tenant's death, *Weston v. Weston*, 125 Mass. 268; or to be divided or trusted at executor's option, notwithstanding proviso as to my being dead "when this bequest takes effect," *Rogers v. Rogers*, 11 R. I. 38. So, where the land is devised to the widow for life or widowhood, to be sold at her death or marriage, or when her youngest child attain twenty-one, and the proceeds divided among her children, *Gest v. Flock*, 1 Gr. Ch. (N. J.) 108.

But where an executor was directed to sell the land and divide the proceeds among four children named, and "in case of the death of either, among their children," such child taking its deceased parent's share, this was held to vest at the time of division, *People v. Jennings*, 44 Ill. 488.

Where the remainder is limited to a class (e. g., children of A,) capable of in-

creasing in number before the determination of the particular estate, the gift will vest at the testator's death in such as then answer the description, subject to open for all after-born members of the class, *Tayloe v. Mosher*, 29 Md. 445; *Phillips v. Johnson*, 14 B. Mon. 172; *Yeaton v. Roberts*, 28 N. H. 459; *Demarest v. Hopper*, 2 Zab. 599, reversing *Den v. Demarest*, 1 Zab. 525; *Ross v. Adams*, 4 Dutch. 179; *Smiley v. Bailey*, 59 Barb. 80; *Doe v. Provost*, 4 Johns. 61; *Van Vechten v. Pearson*, 5 Paige 512; *Macomb v. Miller*, 9 Paige 265, affirmed 26 Wend. 229; *Tanner v. Livingston*, 12 Wend. 83; *Minnig v. Batdorf*, 5 Penna. St. 503; *Rudebaugh v. Rudebaugh*, 72 Penna. St. 271; *Harris v. Alderson*, 4 Sneed (Tenn.) 254; *Taveau v. Ball*, 1 McCord Ch. 7. So, too, if limited after a term of years, *Ballard v. Ballard*, 18 Pick. 41; or made payable in installments at executor's discretion, *Conklin v. Moore*, 2 Bradf. 179. If the remainder be to the children of A, after a life estate to A, and there are no such children in being at the testator's death, the testator's heirs will take a vested remainder subject to be divested on the birth of children of A, *Gilpin v. Williams*, 25 Ohio St. 283. In this case the children were held to take a vested remainder as they were born. So, too, *Fetrow's Estate*, 58 Penna. St. 424; *Rutledge v. Rutledge*, *Dudley Eq.* 201; *Cooper v. Hepburn*, 15 Gratt. 558. In *Tayloe v. Mosher*, 29 Md. 445, the remainder to children of B and children of A, "provided any child he shall leave," was held to vest in B's children, subject to open for A's children, if he should leave any.

If the testator's intention in giving a remainder to his children after a life es-

without issue, this is construed as an immediate disposition of the testator's reversion or remainder; though, upon the face of the will, the devise presents the aspect of an executory gift, to arise on a general failure of issue, which would clearly be void, (b) unless, indeed, the

tate is clearly to include only the children living at the death of the life tenant, the gift will be contingent until that time, *Boone v. Dykes*, 3 Mon. 530; *Emerson v. Cutler*, 14 Pick. 108; *Olney v. Hull*, 21 Pick. 311; *Matter of Ryder*, 11 Paige 185, where the remainder was to the life tenant's "surviving children." So, after a term of years, *Adams v. Beekman*, 1 Paige 631. In this case the intention was shown by gifts over, in case of their death before that time, to their issue, or, if they left none, to the survivors. So, *Hawley v. James*, 5 Paige 463, affirmed 16 Wend. 137. See also *Newell v. Nichols*, 75 N. Y. 78. In *Cresson's Appeal*, 76 Penna. St. 19, a residuary gift to children, "who shall be *then* living," after several devises to the widow for life and in fee and an annuity to her for the support of herself and her children during their minority, was held to be vested, the word "then" being referred to the time of the testator's death. So, in *McKinstry v. Sanders*, 2 T. & C. (N. Y. S. C.) 181, a direction to convey property, pay debts and legacies and pay residue to nephews "who shall then be living."

But it was held in *McGraw v. Davenport*, 6 Port. (Ala.) 319, that where a remainder after a life estate was limited to be divided at the death of the life tenant between such children of the testator *as should then be living*, the gift did not vest until the death of the life tenant; so, *Augustus v. Seabalt*, 3 Metc. (Ky.) 155; *Carmichael v. Carmichael*, 1 Abb. App. 309; S. C., 4 Keyes 346; *Burrill v. Shiel*, 2 Barb. 457; *Tayloe v. Gould*, 10 Barb. 388; *Nash v. Nash*, 12 Allen 345. See, *contra*, *Austin v. Bristol*, 40 Conn. 120; *Shattuck v. Stedman*, 2 Pick. 468; *Gib-*

son v. Walker, 20 N. Y. 476; so, *Manderson v. Lukens*, 23 Penna. St. 31, where the remainder was to the "children who may then be alive or who may have left legitimate heirs;" so, a devise to testator's widow for life, and at her death to be divided into as many parts "as I shall then have children living, the issue of any deceased child to represent their respective parent," *Womrath v. McCormick*, 51 Penna. St. 504. In *Nodine v. Greenfield*, 7 Paige 544, such a remainder was held to be vested at the testator's death, subject to open for those afterwards born, and to be divested as to those who might die before the life tenant; so, too, *Williamson v. Field*, 2 Sandf. Ch. 533.

In *Dominick v. Moore*, 2 Bradf. 201, a direction to sell the land after the death of the life tenant, and divide among A and her six children, or the *survivors* of them, was held to vest at testator's death; so, too, *Weed v. Aldrich*, 2 Hun 531; S. C., 5 T. & C. (N. Y. S. C.) 105.

And a remainder limited generally to several, or the *survivor* of them, vests at the testator's death, *Hopkins v. Hopkins*, 1 Hun 352; S. C., 3 T. & C. (N. Y. S. C.) 527; *Moore v. Lyons*, 25 Wend. 119; *Jeffers v. Lamson*, 10 Ohio St. 101; *Buckley v. Reed*, 15 Penna. St. 83; *Smith's Appeal*, 23 Penna. St. 9; *Drayton v. Drayton*, 1 Desaus. 324; *Hansford v. Elliott*, 9 Leigh 79; or to the *survivor* of two life tenants, *Lantz v. Trusler*, 37 Penna. St. 482; *Mowatt v. Carow*, 7 Paige 328; or to the *surviving* children of A, *Ross v. Drake*, 37 Penna. St. 373; *Hays v. Collier*, 2 Sneed (Tenn.) 585; or to "such children as may *survive*" the life tenant, *Foster v. Wetherill*, 33 Leg. Int. 42; or to testator's "brothers and sisters

will were made or republished since 1837, in which case the words would refer to issue living at the death. If the contingency described corresponds precisely with the event which determines the existing estate tail, no difficulty exists in applying this rule of construction;

surviving," *Dunn v. Sargent*, 101 Mass. 336; *Hurlburt v. Emerson*, 16 Mass. 244. So, a remainder to the surviving issue of a life tenant, with remainder over on his death, without issue, is a vested remainder subject to be divested on the happening of the contingency, *Passmore's Appeal*, 23 Penna. St. 381. But in *Olney v. Hull*, 21 Pick. 311, a remainder, after a life estate, to the testator's "*surviving sons*," they making certain payments, was held to be contingent until the life tenant's death. In *Gardiner v. Guild*, 106 Mass. 25, a remainder to A's "*oldest son*," after a life estate to A, was held to be vested in the person who answered that description at the testator's death; but not in like case to A's "*oldest surviving son*," *Robertson v. Wilson*, 38 N. H. 48.

In *Chism v. Keith*, 1 Hun 589; S. C., 4 T. & C. (N. Y. S. C.) 126, a gift direct to the "*heirs of the body of A whom she shall leave her surviving*," was held to vest at the testator's death, subject to open for those of the class born after, and to be defeated as to any by their death before A. But if the class cannot be ascertained until the death of the first tenant, the gift will be contingent. Thus a devise to the testator's daughters for life, with remainder at their death to their *heirs*, *Putnam v. Gleason*, 99 Mass. 454; *Sheridan v. House*, 4 Abb. App. 218; *Rome Exch. Bank v. Eames*, 4 Abb. App. 98; *Knight v. Weatherwax*, 7 Paige 182; see also a discussion of this subject in *Richardson v. Wheatland*, 7 Metc. 169. In *Rich v. Waters*, 22 Pick. 563, a remainder to *testator's heirs* after a life estate to his widow was held to be contingent, but this case has been overruled, *Abbott v. Bradstreet*, 3 Allen 587; *Lane v. Lane*, 8 Allen 350. And where there is a devise to trustees

for C and his family, for his life, and for his wife and children, if she survive C, and upon his death, and the death or marriage of his wife, the property to descend instantly to the children of C, the children of C take a contingent remainder, *Stephens v. Evans*, 30 Ind. 39. And a limitation over to the *heirs* of the tenant for life has been construed to mean *children*, and to vest at the testator's death, *Bowers v. Porter*, 4 Pick. 198. And in like manner a remainder to "*their male heirs* that they now have or may have hereafter," *Conklin v. Conklin*, 3 Sandf. Ch. 64.

And a *life estate* to B limited after a life estate to A, with an ultimate remainder to B's heirs, was held to be contingent until A's death, *Hall v. Nute*, 38 N. H. 422.

A remainder after A's death to B and C, or *their heirs*, vests in B and C, "*or their heirs*," being construed as words of limitation and not of substitution, *McGill's Appeal*, 61 Penna. St. 46; *Mull v. Mull*, 81 Penna. St. 393; *King v. King*, 1 Watts & S. 205. In *Chew's Appeal*, 37 Penna. St. 23, a remainder to the children of the life tenant, "*and should any of his children be deceased leaving children, these children shall stand in the place of, and represent, their parent*," was held to be vested, notwithstanding the contingency, which was held to take effect, if at all, by substitution. And see *Ware v. Fisher*, 2 Yea. 578, where in a similar case the substituted devise was held to vest at the testator's death in the "*legal representatives*" of a child deceased before the testator. In *Owen v. Owen*, 2 Beas. 188, where there was a devise to the testator's widow for her life, with direction that on her death or mar-

but it frequently happens, that the terms used by the testator do not completely answer to the event in question; as, for instance, where the reference is to issue generally, and the subsisting estate is restricted to issue of a particular marriage or sex. In such cases, the reasonable conclusion would seem to be that the discrepancy arises merely from an inaccuracy in the description of the reversion or remainder, and that it does not show a different interest to have been in the testator's contemplation; and such, accordingly, seems to have been the prevailing doctrine of the cases. (c)

It is to be observed, also, that where *a remainder* is limited *in default* or *for want* of the object or objects of the preceding limitation, these words mean, on the failure or determination of the prior estate or estates, and do not (as literally construed they would) render the ulterior estate

Words in default, or for want, of object of prior estates, how construed.

riage the land be sold, and also a legacy to her of \$500 "of the money arising out of the sale of said farm," the legacy vested at the testator's death, although it could not be enjoyed by the legatee until the time of sale. And where the condition on which the estate to the first taker is to be defeated is a condition subsequent, the estate immediately on the death of testator vests in the first taker, *Sayward v. Sayward*, 7 Greenl. 210; *Newell v. Nichols*, 75 N. Y. 78. And where the testator willed his whole estate to his widow for life, with remainders over at the termination of the life estate, and the widow disented and took one-third of the estate, the remainders limited of the other two-thirds vested immediately, *Holderby v. Walker*, 3 Jones Eq. 46.

In *Little's Appeal*, 81 Penna. St. 190, where property was devised, one-third to

A until her marriage, and two-thirds to testator's widow for life, and *on her death before the marriage or death of A*, a remainder over of her two-thirds, half to A until her marriage, and half to B, the whole to be divided on A's marriage or death, B was held to take a vested remainder for A's life, subject to determine on A's marriage. But where the whole remainder was in case of the life tenant's death or marriage before the marriage or majority of her daughters, the remainder was held to vest in the daughters only at the termination of the life estate, as provided, *De Barante v. Gott*, 6 Barb. 492.

A remainder after a life estate will vest notwithstanding a power of disposal given to the life tenant, *Carter v. Hunt*, 40 Barb. 88; *Thomas v. Thomas*, 1 Rawle 112; *Candler v. Dinkle*, 4 Watts 143; *Ackerman v. Gorton*, 67 N. Y. 63.

(c) *Wellington v. Wellington*, 1 W. Bl. 645, 4 Burr. 2165, *post*; *French v. Cadell*, 3 B. P. C. Toml. 257, *post*; *Jones v. Morgan*, Fea. C. R. 329; *Lytton v. Lytton*, 4 B. C. C. 441; *Egerton v. Jones*, 3 Sim. 409. The case of *Banks v. Holme*, 1 Russ. 394, n., indeed, favors a more rigid construction; but Lord Eldon's strictures upon this case, in *Morse v. Lord Ormonde*,

1 Russ. 405, afford ground to infer that it did not coincide with his own opinion. The strict rule there adopted certainly exacts from testators more of technical correctness than it has been usual to require, and clearly would not now be followed; [see further as to the above cases, ch. XL., § 3, pt. 5, and ch. XLI.]

contingent on the event of such prior object or objects not coming into existence.³ In short, they signify all that is comprehended in the word "remainder," being merely an expression employed by the testator in carrying on the series of limitations. (*d*) The ulterior estate, therefore, is *a vested remainder, absolutely expectant on the failure or determination of the prior estate.

Thus, it has been decided (*e*) that, where lands are devised to the first and other sons of A successively in tail, *and, in default of such sons*, to the daughters of A in tail, although it should happen that A has a son or sons, yet on his or their subsequently dying without issue, the devise in remainder to the daughters takes effect.

So, where (*f*) a testator devised to E. for life, and, after her decease, to the first and every other son of her body lawfully to be begotten, the elder to be preferred to the younger, and, for want of such sons, to

3. A remainder limited on the death of the life tenant without issue has been held to be vested at the testator's death, subject to be divested on the life tenant's leaving children, *Sherrod v. Sherrod*, 38 Ala. 537; *Dunn v. Sargent*, 101 Mass. 336; *Eells v. Lynch*, 8 Bosw. 465; *Pinney v. Fancher*, 3 Bradf. 198; *Hopkins v. Jones*, 2 Penna. St. 69; *Scott v. Price*, 2 Serg. & R. 59; *Kelso v. Dickey*, 7 Watts & S. 279; *Evans v. Davis*, 1 Yea. 332; *O'Driscoll v. Koger*, 2 Desaus. 295; *Hicks v. Pegues*, 4 Rich. Eq. 413; *Buist v. Dawes*, 4 Strobb. Eq. 38; *Chess' Appeal*, 87 Penna. St. 362; *Foley v. Foley*, 17 Hun 235. In like case it has been held, on the contrary, not to vest until the death of the life tenant, *Smith v. Pendell*, 19 Conn. 112. And in *Johnson v. Currin*, 10 Penna. St. 498, such a limitation to the survivor of two life tenants on the death of the other without issue was held to be an executory devise and not a remainder. This case was afterwards questioned in another case involving the same will, *Curran v. McMeen*, 55 Penna. St. 490. For other cases on this subject see the following chapter and notes.

Whether words importing failure of issue refer to determination of subsisting estates tail.—(*d*) In a former

publication, the writer contented himself with simply stating this position, and a single case in support and illustration of it, conceiving that the rule of construction was too well established to be called in question; but subsequent experience taught him that it has not obtained so ready and unanimous an assent in the profession as, from the state of the authorities, was to have been expected. Indeed, even so recently as *Ashley v. Ashley*, 6 Sim. 358, the master reported that, under a devise to A for life, with remainder to her children, and, for want of such issue to B, the devise to B failed on A having a child—a conclusion which the V. C. appears to have regarded as too plainly untenable for serious refutation. The reluctance to acquiesce in a construction at once so reasonable, and so well sustained by authority, is remarkable, but probably is to be ascribed to the yet lingering influence of the long-exploded case of *Keene v. Dickson*, 1 B. & P. 254, n., where a contrary construction prevailed; and serves to show that the uncertainty produced by contradictory decisions is not easily dispelled.

(*e*) *Doe v. Dacre*, 1 B. & P. 250, 8 T. R. 112, [Hayes' Principles, p. 35.]

(*f*) *Goodright v. Jones*, 4 M. & Sel. 88.

the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held, that the devise to M. was a vested remainder, expectant on the determination of the prior successive life estates of E. and her sons and daughters, (the will being subject to the old law,) and those estates having expired *by the death of E.'s only daughter*, M.'s remainder fell into possession.

Again, where (g) A. devised certain lands to D. for life; remainder to a trustee, to preserve contingent remainders; remainder to the first and other sons of D. and their heirs, *and for want of such issue*, to J. for life with remainders over; it was held that the sons of D. took successive estates tail, with a vested remainder.

It is clear too, that where real estate is devised to A in tail, and, in case he shall die without issue, then to B in fee, and it happens that A dies in the testator's lifetime, leaving issue, the ulterior devise to B is held to take effect, although, literally, the contingency on which such devise is made dependent has not occurred; the intention being, it is considered, that the ulterior devise shall confer a vested remainder on B, which is *absolutely to take effect in possession on any event which removes the prior *estate out of the way.* (h) The case just suggested, however, cannot now arise under a will made or republished since 1837, as a devise in tail contained in such a will does not lapse by the death of the devisee in the testator's lifetime, leaving issue.

Where, however, the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails.

Rule where prior estate takes effect, but is determined in a different manner.

As where (i) the devise was to A for life, the remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name, and in case he or they refused, then that devise to be void, and in such case the testator devised the lands over. A survived the testator, complied with the condition, and then died without issue; and it was held in B. R., on a case from chancery, and ultimately in D. P., that the limitation over did not arise. (k)

(g) *Lewis v. Waters*, 6 East 336. [See also *Sheffield v. Lord Orrery*, 3 Atk. 282, also *Hennessy v. Bray*, 33 Beav. 96. post p. *803.]

(h) *Hutton v. Simpson*, 2 Vern. 722; *Hodgson v. Ambrose*, Doug. 337.] (k) Compare this case with *Avelyn v. Ward*, 1 Ves. 420, and *Doe v. Scott*, 3 M. & Sel. 300, stated ante p. *648, in which the lapse of a prior estate, on whose con-

(i) *Amhurst v. Donelly*, 8 Vin. Ab. 221, pl. 21, 5 B. P. C. Toml. 254; see

An exception to this rule, however, may seem to exist in a case which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and if she shall marry*, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.⁴

In *Luxford v. Cheeke*, (l) which is a leading authority for this doctrine, the testator devised to his wife for life, *if she should not marry again, but if she did*, then that his son H. should presently after his mother's marriage enjoy the premises to him and the heirs of his body, with remainders over. The widow died without marrying again; but it was held, that the remainder took effect.

**Gordon v. Adolphus* (m) was a case of the same kind. The bequest was to the testator's wife "during her natural life, that is to say, so long as she shall continue unmarried; *but in case she shall choose to marry*, then and in that case" it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was held by Lord Camden, and afterwards in *D. P.* that the bequest over was not contingent on the event of the marriage of the wife.

In these cases, therefore, the widow takes an estate *durante viduitate*, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect at all events on its determination, and not conditional limitations dependent on the contingent determination of a prior estate for life.

tingent determination the subsequent estate was to arise, was held not to defeat the subsequent estate. In order to reconcile these cases with *Amhurst v. Donelly*, we must infer, that, in the latter case, had the estate of A and his sons failed by lapse, the devise over would have taken effect. *Pari ratione*, it must be concluded, that had the prior devisee in those cases survived the testator and performed the condition, the devise over (if the whole interest had not been absorbed as it was by the first devisee) would not have taken

effect.

4. *Farmers' Bank v. Hooff*, 4 Cranch C. C. 323; *Thrasher v. Ingram*, 32 Ala. 645; *Chappel v. Avery*, 6 Conn. 31; *Conwell v. Heavilo*, 5 Harring. 296; *Ferson v. Dodge*, 23 Pick. 287; *Birdsall v. Hewlett*, 1 Paige 32; *Manderson v. Lukens*, 23 Penna. St. 31; *Biddle's Appeal*, 69 Penna. St. 190. But see *Chapin v. Marvin*, 12 Wend. 538.

(l) 3 Lev. 125.

(m) 3 B. P. C. Toml. 306; [see also *Brown v. Cutter*, T. Raym. 427.]

In Lady Fry's Case, (n) Lord Hale said, it was all one as if the estate had been devised to the widow for life, and if she married, then to remain, which had been but an estate *quamdiu sola vixerit*. If, however, the devise had been framed in the manner suggested by this eminent and excellent judge, the case would have been brought into very close resemblance to *Sheffield v. Lord Orrery*, (o) where a different construction prevailed. There A devised his house, &c., to his wife for life, upon the express condition only, that *if she should marry again*, then the house, &c., should go forthwith to his eldest son and his issue. Lord Hardwicke held, that it was a contingent limitation to the son, to take effect only on the wife's marrying again. In *Luxford v. Cheeke*, he said, the penning was different; there, after the devise, were added these words, "if she do not marry again," which restrained the original limitation, and were the same as if they had been to the wife for life, "if she so long continued a widow." Here there were no such words in the original limitation; and though he added, "but I do not lay much weight on this," and proceeded to comment on other grounds for the construction, yet the remarks above quoted have always been considered as pointing out the true principle of the decision.

Devise over
on marriage
again, strictly
construed.

On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate *durante viduitate*, must generally be considered, when he subsequently refers to the marriage, to describe the *determination *by any means* of that estate, and, consequently, the gift over is a vested remainder expectant thereon. (p)⁵ On the other hand, where a testator first gives an absolute estate for life, and then engrfts thereon a devise over to take effect on the marriage of such devisee for life, the conclusion is, that the devise over is not to take effect unless the contingency happens. (q) [And the construction being that the

General con-
clusion from
the cases.

(n) 1 Vent. 203; see also *Jordan v. Holkham*, Amb. 209, where Lord Hardwicke took a distinction between a devise during widowhood, and if she married again within a limited time.

(o) 3 Atk. 282.

[(p) See acc. *Browne v. Hammond*, Johns. 210, 213; *Underhill v. Roden*, 2 Ch. D. 494.]

5. See *Bates v. Webb*, 8 Mass. 458;

Gibson v. Land, 27 Ala. 117. •

[(q) The question whether the event of not marrying is or not interwoven in the original gift, may be difficult of solution. In *Meeds v. Wood*, 19 Beav. 215, a testator gave real estate to his executor in trust for E. for her life, and directed the executor to pay her the rents every six months, "provided that if E. should marry," then over. The M. R. admitted

limitations over take effect, at all events, on the determination of the widow's estate, whether by marriage or death, it is not displaced by the circumstance that some of those limitations (*e. g.*, a provision for the widow during the remainder of her life, expressly in case she marries,) can only take effect in the event of her marrying: although she should not marry, the other limitations will still take effect as vested remainders expectant upon her death. (*r*)

A similar construction prevails where the prior gift is to a spinster until marriage, (*s*) or to a person until he becomes bankrupt, (*t*) with a gift over in case of marriage or bankruptcy. In these cases also the remainder will generally take effect at all events on the determination of the prior estate.]

Devise over on bankruptcy, &c., extended by implication to case of death.

until marriage, (*s*) or to a person until he becomes bankrupt, (*t*) with a gift over in case of marriage or bankruptcy.

In these cases also the remainder will generally take effect at all events on the determination of the prior estate.]

***II.**—The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that inter-

Devises vested, notwithstanding expressions of seeming contingency.

est, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that inter-

the distinction taken in the text, but thought the direction to the executor to pay E. the rents limited the previous gift to so long as she remained a spinster, since "it was obvious the testator intended the rents to be paid to her herself," and if she married, she would no longer be entitled to receive them, except by the intervention of a trust for her separate use, which was inconsistent with the intention; he therefore held that the gift over took effect on the death of E., though she had never been married. In *Bainbridge v. Cream*, 16 Beav. 25, where a testator gave lands to his wife for life, but if she married again he revoked them, and at her death or second marriage gave the lands to trustees for sale, the produce to be divided among certain persons, (naming them,) "or such of them as should be living at the death of his wife;" the wife married again, and the trustees sold; and it was held by the M. R. that the proceeds were divisible immediately, notwithstanding the widow was still living.]

In one case a devise which, in express terms, extended to widowhood only, was held to be enlarged by implication to the

period of the vesting in possession of a remainder limited thereon. The devise was to the testator's wife for her life, provided she remained a widow; but if she married a second husband, to I., *when he should attain his age of twenty-three years*; and it was held, that the widow had an estate till I. attained twenty-three, though she married again, *Doe d. Dean and Chapter of Westminster v. Freeman*, 1 T. R. 389, 2 Chitty's Cas. temp. Lord Mansfield, 498.

[*(r)* *Underhill v. Roden*, 2 Ch. D. 494. See also *Eaton v. Hewitt*, 2 Dr. & Sm. 184; *Wardroper v. Cutfield*, 33 L. J., Ch. 605. In *Pile v. Salter*, 5 Sim. 411, it was held that a gift to the widow of one-third of the *corpus* "if she married again" (following a life interest in the whole during widowhood) was necessarily contingent, "it would be absurd to give her one-third of the property in the event of her death." But this was disapproved and the absurdity denied by Jessel, M. R., in *Underhill v. Roden*.

(*s*) *Eaton v. Hewitt*, 2 Dr. & Sm. 184; *Wardroper v. Cutfield*, 33 L. J. 605.

(*t*) *Etches v. Etches*, 3 Drew. 441.

est, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee simple, subject to the prior chattel interest given to the trustees, and, consequently, on A's death, under the prescribed age, the property descends to his heir-at-law; though it is quite clear (*u*) that a devise to A, *if* or *when* he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only. ⁶

(*u*) Grant's Case, cited 10 Co. 50; Sugd. Law of Prop. 291; Alexander v. Alexander, 16 C. B. 59; and per James, L. J., Andrew v. Andrew, 1 Ch. D. 417. However, the decision of this last point was expressly avoided by the judges in Phipps v. Ackers, 9 Cl. & F. 583; and see Tapscott v. Newcombe, 6 Jur. 755; and Simmonds v. Cock, 29 Beav. 455 (stated below.)]

6. The following gifts referred to the donee's coming of age have been held to be vested: "as they come of age" such part as executor may think proper, and final division when the youngest reaches the age of twenty-one, McLemore v. McLemore, 8 Ala. 687; until daughter becomes sixteen, then divide, High v. Worley, 32 Ala. 709; Drake v. Pell, 3 Edw. 251; to be divided, each to receive his share as he comes of age or is married, Cox v. McKinney, 32 Ala. 461; to be paid at twenty-one, Gregg v. Bethea, 6 Port. (Ala.) 9; Meyer v. Eisler, 29 Md. 28; Eldridge v. Eldridge, 9 Cush. 516; Brown v. Brown, 44 N. H. 281; Collin v. Collin, 1 Barb. Ch. 630; Weyman v. Ringold, 1 Bradf. 40; Harris v. Fly, 7 Paige 421; Page's Appeal, 71 Penna. St. 402; Ruffin v. Farmer, 72 Ill. 615; or after twenty-five years, Sears v. Putnam, 102 Mass. 5; Converse v. Kellogg, 7 Barb. 590; Kimball v. Crocker, 53 Me. 263; or between twenty-one and twenty-

five, at the discretion of trustees, Schnure's Appeal, 70 Penna. St. 400; to be divided among the testator's children, the executor to keep for their use until they attain the age of twenty-one, Young v. McKinnie, 5 Fla. 542; or to remain in joint stock until, &c., Hathaway v. Leary, 2 Jones Eq. 264; Perry v. Rhodes, 2 Murph. 140; "should he live to be twenty-one," if not, over, Bowman v. Long, 23 Ga. 247; Kelso v. Cuming, 1 Redf. 392; "when they marry or come of age," Roberts v. Brinker, 4 Dana 570; Danforth v. Talbot, 7 B. Mon. 623; Hughes v. Hughes, 12 B. Mon. 115; "when they become twenty-one," "as they become," &c., Allan v. Van Meter, 1 Metc. (Ky.) 264; Caldwell v. Kinkhead, 1 B. Mon. 231; Eldridge v. Eldridge, 9 Cush. 516; Ware v. Cook, 1 Halst. Ch. 193; Roome v. Phillips, 24 N. Y. 465; Thompson v. Thompson, 28 Barb. 432; Hoxie v. Hoxie, 7 Paige 187; Buckley v. Reed, 15 Penna. St. 83; Bowman's Appeal, 34 Penna. St. 19; Corbin v. Wilson, 2 Ash. 178; Newport v. Cook, 2 Ash. 332; Kinsey v. Lardner, 15 Serg. & R. 196; Mackie v. Alston, 2 Desaus. 362; or to be "at their own disposal as soon as they arrive" at twenty-one, Burrill v. Shiel, 2 Barb. 457. And where the gift was of income to G. for life, then to W. until he attained twenty-five years, and principal payable to W. at twenty-five, and if W. died be-

A leading authority for this construction is *Boraston's Case*, (x) which was as follows:—A testator devised land to A and B for eight years, and after the said term, the land to remain to

Boraston's Case.

fore twenty-five, and without issue, over, and W. died at thirty-seven, but *before* G., it was held that the estate vested in W. at twenty-five, *McCall's Appeal*, 86 Penna. St. 254. See also *Scott v. Price*, 2 Serg. & R. 59; *Toms v. Williams*, 41 Mich. 552. So, in *Ackless v. Seekright*, *Breese* 76, a remainder over to A on B's marrying or attaining twenty-one, is vested; so, to A "until" her children attain twenty-one, "then" to them, *Williams v. Van Cleave*, 7 Mon. 388; *Herbert v. Post*, 11 C. E. Gr. (N. J.) 278, affirmed 12 C. E. Gr. (N. J.) 540; *Morton v. Morton*, 8 Barb. 18; (but see, *contra*, *Butler v. Butler*, 3 Barb. Ch. 304;) *Young v. Stoner*, 37 Penna. St. 105; *Hancock v. Titus*, 39 Miss. 224; or a devise to the widow "until the expiration of the minority of her oldest son, with remainder to him on his arriving at age," *Grigsby v. Breckinridge*, 12 B. Mon. 632; *Johnson v. Baker*, 3 Murph. 318; *Hodgson v. Gemmit*, 5 Rawle 99; or to testator's children to be equally divided between them and paid over to them as they severally arrive at the age of twenty-one, *Wallingford v. De Bell*, 15 B. Mon. 551; *Reed v. Buckley*, 5 Watts & S. 517; *Stevenson v. Lesley*, 70 N. Y. 512; or "when my oldest son shall attain the age of twenty-one," *Collier's Will*, 40 Mo. 285; *Gest v. Flock*, 1 Gr. Ch. (N. J.) 108; *Johnson v. Valentine*, 4 Sandf. S. C. 36; *Sims v. Smith*, 6

Jones Eq. 347; *Letchworth's Appeal*, 30 Penna. St. 175; *Kelly v. Dike*, 8 R. I. 436; *Dale v. White*, 33 Conn. 293; or to be divided among children "as they attain," &c., *Buckley v. Reed*, 15 Penna. St. 83; *Price v. Watkins*, 1 Dall. 8; *Maggoffin v. Patton*, 4 Rawle 113. So in *Ordway v. Dow*, 55 N. H. 11, a trust for A "until he attain" twenty-one, then to pay over, with a gift of income for maintenance meanwhile, is held to be vested; so, too, *Tucker v. Bishop*, 16 N. Y. 402; *Pinckney v. Pinckney*, 1 Bradf. 269; *Verrill v. Weymouth*, 68 Me. 318; *Lowe v. Barnett*, 38 Miss. 329; or "when he attains," &c., with like gift of income, *Paterson v. Ellis*, 11 Wend. 259; *Kerlin v. Bull*, 1 Dall. 175; so a gift "to be paid when they attain" twenty-one, *Stephens v. Milnor*, 9 C. E. Gr. (N. J.) 358; and so a like gift with income for maintenance meanwhile, *Provenchère's Appeal*, 67 Penna. St. 463; and a gift to A, with remainder over if he die before twenty-one, is vested, *Picot v. Armistead*, 2 Ired. Eq. 226; so income to children until A attains twenty-one, and principal when A attains twenty-one, *Van Wyck v. Bloodgood*, 1 Bradf. 154; *Roberts' Appeal*, 59 Penna. St. 70; or like gift to A, *McCall's Estate*, 32 Leg. Int. 91; so, a remainder to children, to be held in trust if they should be under age, until they become twenty-one, *Valentine v. Borden*, 100

(x) 3 Rep. 19; see also *Manfield v. Dugard*, 1 Eq. Cas. Ab. 195, pl. 4, *Gilb. Eq. Rep.* 36; [*Doe d. Morris v. Underdown*, *Willes* 293;] *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; *Den d. Satterthwaite v. Satterthwaite*, 1 W. Bl. 519; *Doe d. Weedon v. Lea*, 3 T. R. 41; *Doe d. Wight v. Cundall*, 9 East 400; *Edwards v. Symonds*, 6 Taunt. 213; [*Farmer v. Francis*, 2 Bing. 151;] *Goodright d. Revell v. Parker*, 1 M. & Sel. 692,

(leaseholds;) *Warter v. Hutchinson*, 5 Moore 143, 2 B. & Bing. 349, 3 D. & Ry. 58, 1 B. & Cr. 721; [*Jackson v. Majoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 Id. 48; *Parkin v. Knight*, 15 Id. 83; *James v. Lord Wynford*, 1 Sm. & Gif. 40; *Smith v. Spencer*, 6 D., M. & G. 631; but see *Bastin v. Watts*, 3 Beav. 97, where, however, the point was not argued; and *Blagrove v. Hancock*, 16 Sim. 371, where the V. C. did not notice the question.]

his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years; and *when* the said H. should come to his age of twenty-one, then to him, his heirs and assigns forever. H. died under twenty-

Word "when" referred to determination of prior estate.

Mass. 273; *Chesnut v. Strong*, 1 Hill Ch. (S. C.) 123; so, a direct bequest to A "if he shall arrive to the age of twenty-one years," *Furness v. Fox*, 1 Cush. 134; *Kelso v. Dickey*, 7 Watts & S. 279; *Raney v. Heath*, 2 Pat. & H. 206; so a gift payable in installments at twenty-one, twenty-five, &c., *Felton v. Sawyer*, 41 N. H. 202; *Hayes v. Tabor*, 41 N. H. 521; *Hellman v. Hellman*, 4 Rawle 440; *Scott v. Price*, 2 Serg. & R. 59; *Donner's Appeal*, 2 Watts & S. 372. But not an annuity for ten years payable in quarterly installments, *Bates v. Barry*, 125 Mass. 83

And where the contingency does not affect the person to take, the remainder is often construed to be vested as to the person, and as such transmissible. Thus, in *Winslow v. Goodwin*, 7 Metc. 375, a remainder, if the life tenant die before her husband, to her children, to be paid them as they attain twenty-one, vests at the testator's death, subject to the contingency; so, too, *Childs v. Russell*, 11 Metc. 16; *Clapp v. Stoughton*, 10 Pick. 463; *Roome v. Phillips*, 24 N. Y. 465. And in *Rivers v. Trippe*, 4 Rich. Eq. 276, a remainder to issue "who shall live to attain the age," &c., was held to be vested.

But the following gifts have been held contingent and not vested: property to be kept together until daughter arrive at twenty-one, "when she becomes of age or is married, she is to have," &c., *Collier v. Slaughter*, 20 Ala. 263; *Butler v. Butler*, 3 Barb. Ch. 304; to A, if he lives to be twenty-one, to B provided A does not live, &c., *Nixon v. Robbins*, 24 Ala. 663; trust for wife and children, with sale and division in event of their marriage or of the children arriving at twenty-one, *Travis v. Morrison*, 28 Ala. 494; "when she marries or becomes twenty-one," *Allen v. Whitaker*, 34 Ga. 6; see also *Leeds v. Wakefield*, 10 Gray

514. So, a gift "to A when he arrives at the age of twenty-one years," *Gifford v. Thorn*, 1 Stockt. 702; *Giles v. Franks*, 2 Dev. Eq. 521; *Clayton v. Somers*, 12 C. E. Gr. (N. J.) 230; *Emmons v. Cairns*, 3 Barb. 243, reversing 2 Sandf. Ch. 369; or "as they arrive," &c., *Seibert's Appeal*, 13 Penna. St. 501; or "as soon as he arrives," &c., *Moore v. Smith*, 9 Watts 403; or income to A until B attains the age of twenty-one, and then to B, *King v. Crawford*, 17 Serg. & R. 118; or "if they should live to come of age," *Jackson v. Winne*, 7 Wend. 47; or "if she should continue under the direction of A till she comes of age," *Gilliland v. Bredin*, 63 Penna. St. 393; or "when he shall arrive at the age of twenty-one years, or at the death or marriage" of the widow, *Snow v. Snow*, 49 Me. 159. So a remainder to such children as "shall at her decease have attained" twenty-one, *Taylor v. Gould*, 10 Barb. 388. So a remainder after the life tenant's death, when the children shall become twenty-one and be married and have children, was held to vest only at the death of the life tenant, *Burrows v. Stumm*, 22 How. Pr. 169. In general, unless a contrary intention appear, gifts *if*, *at* or *when* the donee comes of age are held to be contingent, *Watkins v. Quarles*, 23 Ark. 179; *Scott v. Logan*, 23 Ark. 351; *Colt v. Hubbard*, 33 Conn. 281; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315. In *Yearnshaw's Appeal*, 25 Wis. 21, where certain bequests were made to X. and Y., if a certain contract was consummated, and such contract was never consummated, it was held that the bequests never vested, but that as it appeared to be the intention of the testator that the bequests to X. and Y. should be paid if there was sufficient surplus to pay them, X. and Y. would take, although the surplus did not arise from said contract.

one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H. attained the age of twenty-one, remainder to H. in fee; and that the adverbs of time, *when*, &c., did not make anything necessary to precede the settling **(i. e., the vesting)* of the remainder, but merely expressed the time when it should take effect in possession.

So in *Doe d. Cadogan v. Ewart*, (y) where a testator devised his real estate to trustees, upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after her attaining that age*, then upon trust for his said daughter, her heirs and assigns forever; but in case his said daughter should depart this life without leaving issue, then the testator devised the said real estate over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.

Words "from and after" similarly construed.

the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after her attaining that age*, then upon trust for his said daughter, her

It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the principle, for the material fact, and that which constitutes the special characteristic of this class of cases, is, that there is a prior interest extending over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate *instantly* to B, with the exception of a partial interest carved out for some (no matter what) purpose.

Remark on preceding cases.

prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the

Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend on the fact of the prior interest taking effect; in such cases it is considered that the testator merely uses these expressions of apparent contingency as descriptive of the state of events under which he conceives the ulterior gift will fall into possession; (the supposition being, that the successive interests will take effect in

Words of apparent contingency referred to the possession merely.

cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such

the order in which they are expressed,) and not with the design of making the vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession.⁷

Thus, in *Webb v. Hearing*, (z) where a testator devised to his son F. after the death of his wife; *and if his three daughters, or *either of them, should overlive their mother and F., their brother, and his heirs*, (which was construed to mean heirs of his body,) they to enjoy the same houses for the term of their lives, remainder to R. and J.; it was held, that the remainder to R. and J. was not contingent on the event of the daughters surviving their mother and brother; the words only showed when it should commence.*

So, in an early case, (a) where the devise was to K. in tail, remainder to J. for life, and in another clause it was declared, that "if K. died without issue, *and J. be then deceased*," then, and not otherwise, the testator gave the land to N. and his heirs; the Lord Keeper, it is said,

7. Where the time of payment only is future, a legacy is vested, unless a contrary intention appear, *Gregg v. Bethea*, 6 Port. (Ala.) 21; *Marr v. McCullough*, 6 Port. (Ala.) 507; *Kihler v. Whiteman*, 2 Harr. (N. J.) 401; *Wheeler v. Lester*, 1 Bradf. 213; *Marsh v. Wheeler*, 2 Edw. 156; *Kimball v. Crocker*, 53 Me. 263; *Ruffin v. Farmer*, 72 Ill. 615; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315; *Sutton v. West*, 77 N. C. 429; *Roberts v. Brinker*, 4 Dana 570; *Danforth v. Talbot*, 7 B. Mon. 623, 629; *Grigsby v. Breckinridge*, 12 B. Mon. 629, 633; *Watkins v. Quarles*, 23 Ark. 179, 188; especially where the income is given meanwhile, *Dupré v. Thompson*, 8 Barb. 537. Such a postponement of the time of payment only is hardly to be distinguished from a bond for the payment of money at a future day. "It is *debitum in presenti*, though *solvendum in futuro*," *Collier's Will*, 40 Mo. 287, 326; *Bowman v. Long*, 23 Ga. 242, 246; *Ford v. Whedbee*, 1 Dev. & Bat. Eq. 16. So, too, where the property is to be sold and the proceeds divided after sale, *Herbert v. Tuthill*, Saxt. 141. But see, *contra*, *People v. Jennings*, 44 Ill. 488.

Words of time are generally construed

to refer to the time of *possession*, not of *vesting*, "when," "then," *Williamson v. Williamson*, 18 B. Mon. 329; *Minnig v. Batdorf*, 5 Penna. St. 503; *Letchworth's Appeal*, 30 Penna. St. 175; *Sims v. Smith*, 6 Jones Eq. 347; *Rivers v. Trippe*, 4 Rich. Eq. 276, 298; "whenever," *Manderson v. Lukens*, 23 Penna. St. 31; "from and after," *Gibson v. Walker*, 20 N. Y. 476; *Johnson v. Valentine*, 4 Sandf. 36; "if," "when," *Sutton v. West*, 77 N. C. 429; *Giles v. Franks*, 2 Dev. Eq. 521; *Guyther v. Taylor*, 3 Ired. Eq. 323; *Allan v. Vanmeter*, 1 Metc. (Ky.) 264; "after," *Livingston v. Greene*, 52 N. Y. 118, affirming 6 Lans. 50; "at and upon," *Bedell v. Guyon*, 12 Hun 396. But see *Watkins v. Quarles*, 23 Ark. 179, 188; *Clayton v. Somers*, 12 C. E. Gr. (N. J.) 230. Where the devise was to C, to become his property when he arrived at the age of twenty-six years, C took a vested right, of which he could dispose at the age of twenty-one, *Danforth v. Talbot*, 7 B. Mon. 623, 632.

(z) *Cro. Jac.* 415. According to the facts represented, it does not appear that the remainder, if contingent, was defeated, as only two of the daughters are stated to have died in the lifetime of their brother.

(a) *Anon.*, 2 Vent. 363.

decreed it to N., although J. survived K., because the words "if J. be then deceased," seemed to be put in to express the testator's meaning, that J. should be sure to have it for her life, and that N. should not have it till she was dead; and also to show when N. should have it in possession.

So, in *Pearsall v. Simpson*, (b) where a legacy was given in trust for the testatrix's sisters and their children; and after the deaths of both her said sisters and their children, if any, to pay the interest to her brother-in-law, S., during his life, and from and after his decease, *in case he should become entitled to such interest*, then over to some cousins. Though S. died in the lifetime of the testatrix's sisters, it was held that the gift to the cousins took effect, Sir W. Grant, M. R., being of opinion that it was not contingent on the event of the sister's husband becoming entitled to the interest. "It was doubtful (he said) whether S. would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest; but if he does, she makes his death the period at which the cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if *he* ever takes."

Here no violence was done to the obvious meaning of the words, as
Remark on Pearsall v. Simpson. it is impossible to read the whole sentence continuously, "from and after his decease, in case he should become entitled to such interest," without seeing that the words of contingency, "in case," &c., refer merely to the period of possession, denoting that that should take place at his death, if he happened to live to become entitled.

So, in *Massey v. Hudson*, (c) where a testator devised to his *wife for life, charged with an annuity to E., subject also to £300 to be paid to V., her executors, administrators or assigns, within twelve months after the decease of E., *in case the said E. should happen to survive testator's wife*, with interest from the death of E. E. died in the testator's lifetime, and in the lifetime of his wife. Sir W. Grant, M. R., thought it too clear for argument, that the words, "in case E. shall

(b) 15 Ves. 29.

(c) 2 Mer. 130. [See also *Key v. Key*, 4 D., M. & G. 73; *Wright v. Wright*, 21 L. J., Ch. 775; *Walmsley v. Vaughan*, 1 De G. & J. 124; *Tuer v. Turner*, 18 Beav. 185; *In re Betty Smith's Trusts*, L. R., 1 Eq. 79; *Bolton v. Bolton*, L. R.,

5 Ex. 145; *Edgworth v. Edgworth*, L. R., 4 H. L. 35; *Leadbeater v. Cross*, 2 Q. B. D. 18.] Compare these and the preceding cases with *Holmes v. Cradock*, 3 Ves. 317, stated *post*; [and see *Davis v. Norton*, 2 P. W. 390, first point.

survive my wife," did not constitute the condition on which the legacy was to become payable, but only related to the time of payment, which was, in that event, to be postponed to the end of a twelvemonth after the death of E.

[The case of *Franks v. Price* (d) presents an instance both of an apparent and of a real contingency in the same will. There a testator devised to A, B, &c., for their lives, with remainder to M. and N. for their lives, share and share alike; "and in case either of them should, *after the deaths of A, B, &c., die without issue,*" then to the survivor for life; and if M. "should, *after the deaths of A, B, &c., die before N., leaving issue male of his body,*" then one moiety of the estates was to go as therein mentioned; "and in case of such death in manner aforesaid of M. before N., and M.'s leaving issue male," the testator gave one moiety of his personal estate to be laid out in land, to be conveyed and settled to the uses thereinbefore directed of his real estates, "on the issue of M., *on the contingency* aforesaid." The testator made a similar disposition, *mutatis mutandis*, of the other moiety in case of the death of N. after the deaths of A, B, &c., leaving issue male. Lord Langdale thought that the words "after the deaths of A, B, &c.," did not import contingency, but were merely words of reference, showing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession till those prior gifts became satisfied or inoperative; but from the words used with reference to the event of M. dying before N., leaving issue male, and with reference to the event of N. dying before M., leaving issue male, and even from the care taken to repeat the words as applied to the case of M. and N. respectively, it appeared to him that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

*The result of the authorities is thus summed up by Sir W. P. Wood, V. C. (e) "The true way of testing limitations of that nature is this: can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited?' Take the simplest case: a limitation to A for life, remainder to B for life, and upon the decease of B *if A be dead*, then to C in fee. There the limitation to C is apparently made contingent on the event of A's dying in the lifetime of B.

Sir W. P.
Wood's state-
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authorities.

(d) 3 Beav. 182, 5 Bing. N. C. 37, 6 Scott 710.

(e) *Maddison v. Chapman*, 4 K. & J. 719.]

Nevertheless, inasmuch as the condition of A's death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A for life, remainder to B for life, and on B's death, *subject to A's life interest (if any),* to C in fee. That is an intelligible principle of construction; but in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A for life, remainder to B for life, 'and if, at the death of B, A shall have died under the age of twenty-one,' or 'without children,' then to C in fee, here in either case room is left for contingency. The condition of A's dying in the first case under twenty-one, and in the second, without children, is an event which may or may not have happened when the life estates in A and B are determined; and until it has happened, the limitation over is contingent, not merely in appearance but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply."]

And although (as already hinted) there is no doubt that a devise to

Devise, if A shall attain twenty-one, contingent;

—otherwise, if a limitation over in alternative event.

a person, [when, or] if he shall live to attain, [or at,] a particular age, standing alone, would be contingent;⁸ yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest

in the property to depend on his attaining the specified age, namely, that at the age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter*. (f)⁹

8. *Colt v. Hubbard*, 33 Conn. 281; *Watkins v. Quarles*, 23 Ark. 179; *Scott v. Logan*, Id. 352; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

(f) Even independently of this particular rule, it is obvious that a limitation over disposing of the property to another, in case of the prior devisee dying under certain circumstances, always supplies an argument in favor of the prior devisee taking an immediately vested interest, *Smither v. Willock*, 9 Ves. 233; *Peyton v. Bury*, 2 P. W. 626; *Murkin v. Phillipson*, 3 My. & K. 257; [per Wood, V. C.,

L. R., 3 Eq. 322;] though the contrary is sometimes contended.

9. *Herbert v. Post*, 11 C. E. Gr. (N. J.) 278; *Ackless v. Seekright*, Breese 76; *Young v. Stoner*, 37 Penna. St. 105; *Morton v. Morton*, 8 Barb. 18; *Grigsby v. Breckinridge*, 12 B. Mon. 632; *Johnson v. Baker*, 3 Murph. 318; *Wallingford v. De Bell*, 15 B. Mon. 551; *Collier's Will*, 40 Mo. 285; *Gest v. Flock*, 1 Gr. Ch. (N. J.) 108; *Kelly v. Dike*, 8 R. I. 436; *Price v. Watkins*, 1 Dall. 8; *Dale v. White*, 33 Conn. 293; *Sims v. Smith*, 6 Jones Eq. 347.

*Thus, in *Edwards v. Hammond*, (*g*) where A surrendered the reversion in fee in customary lands to the use of himself for life, and, after his decease, to the use of his son H. and his heirs and assigns forever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always, and under the condition, nevertheless, that *if H. died before he attained that age*, then the premises to remain to A. in fee; it was held, that though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to H., subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

The same construction prevailed in *Doe d. Hunt v. Moore*, (*h*) where the devise was to M., "*when he attains the age of twenty-one years*," to hold to him, his heirs and assigns forever; *but in case he should die before he attained the age of twenty-one years*, then over; Lord Ellenborough observed, that this being an immediate devise, and not, as in some of the other cases, a remainder, formed no substantial ground of distinction. The estate vested immediately, whether there was any particular interest carved out of it to take effect in possession in the meantime or not.

Again, in *Doe d. Roake v. Nowell*, (*i*) where the devise was to the testator's nephew R. for life, and on his death to and amongst his children equally *at the age of twenty-one*, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one; and in case R. should die without issue, or such issue should die *before twenty-one*, then over. R. levied a fine during the minority of his children, which raised the question whether their shares were contingent or vested, or, in other words, whether they were destructible by the act of R. or not. It was held in B. R., and ultimately in D. P., that the remainders were vested in the children on their births.¹⁰

[This case shows that the rule applies where the devise is to a class.]

(*g*) 3 Lev. 132, 2 Show. 398, and stated from the record, 1 B. & P. N. R. 324, 582, 1 P. & Dav. 568; [*Greene v. Potter*, 2 Y. & C. C. 517.]

(*h*) 14 East 601.

(*i*) 1 M. & Sel. 327, 5 Dow. 202; see also *Doe d. Dolley v. Ward*, 9 Ad & El. 510, 10. *Bowman v. Long*, 23 Ga. 247; *Kelso v. Cuming*, 1 Redf. 392; *McCall's Appeal*, 86 Penna. St. 254; *Picot v. Armistead*, 2 Ired. Eq. 226.

The rule, it seems, applies not only where the devise over is limited so as to take effect simply and exclusively on the failure of the event on which the prior devise is apparently made contingent, but also where some other event is associated.

Thus, in *Bromfield v. Crowder*, (*j*) the devise was to certain persons for life, and at the decease of them or the longer liver of them to J. if he should live to attain the age of twenty-one years; and in case he died before he attained that age, *and his brother C. should survive him*, then over. On a case from the Rolls, the Court of C. P. certified that J. took a vested fee. Sir J. Mansfield, C. J., relied much on the authority of *Edwards v. Hammond*, which he said was on all fours with this. [So that if *either* event happens, the prior devise becomes absolute.] (*k*)

Doctrine of preceding cases applicable to executory trusts.

The construction also obtains where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration.

Thus, in *Phipps v. Williams*, (*l*) where a testator devised his real estates to trustees, upon trust to convey certain lands to his godson A when and so soon as he should attain his age of twenty-one years; *but in case he should depart this life before he should attain the said age of twenty-one years, without leaving issue of his body*, then the lands in question were to go according to the disposition of his residuary estate. Sir L. Shadwell, V. C., on the authority of the preceding cases, held that A took an immediate interest under this devise, observing that the only distinction here was that the legal estate was vested in trustees, which made no substantial difference.

[In *Finch v. Lane*, (*m*) the rule was applied to a case where the apparent contingency was, not the devisee attaining a particular age, but his surviving the person to whom a prior life estate was devised. The devise was to the testator's wife for life, with remainder, as to part, to his brother for life, and from and immediately after the death of the wife, subject to the brother's interest in the part, to M. in fee if she should be living

Whether it is applicable where the event is unconnected with the age of the devisee.

apparent contingency was, not the devisee attaining a particular age, but his surviving the person to whom a prior life estate was devised. The devise was to the testator's wife for life, with remainder, as to part, to his brother for

(*j*) 1 B. & P. N. R. 313; [affirmed in D. P., see 14 East 604, Sugd. Law of Prop. 286. See also *Whitter v. Bromridge*, L. R., 2 Eq. 736; *Finch v. Lane*, L. R., 10 Eq. 501.

(*k*) In *re Thomson's Trusts*, L. R., 11 Eq. 146 (legacy.) Cf. *Malcolm v. O'Cal-*

laghan, 2 Mad. 349.]

(*l*) 5 Sim. 44, [9 Cl. & F. 583 (*Phipps v. Ackers*); *Stanley v. Stanley*, 16 Ves. 491. So where personal estate is directed to be invested in the purchase of land, *Jackson v. Majoribanks*, 12 Sim. 93.

(*m*) L. R. 10 Eq. 501.

at the death of the wife, but if M. should die before the wife without leaving issue, then to other persons: M. died before the widow, but left issue; and it was held by Lord Romilly, that the case was governed by *Phipps v. Ackers*, and that M. took a vested remainder.

*On the other hand, in *Doe d. Planner v. Scudamore*, (n) where a testator devised to his brother A for life, and after the death of A, to B in fee, in case she should survive A, but not otherwise, and in case B should die before A, then to A in fee; it was held in C. P. that the remainder to B was contingent, and that it had been destroyed by a fine levied by A. *Edwards v. Hammond* (which was the only case of this class then decided) was held not to be applicable, on the ground, stated by Lord Eldon, C. J., that it was there "matter of necessary implication that the estate should vest in the eldest son during his infancy, for whatever might be the construction of the prior words it was clearly expressed that, unless the son died before twenty-one, the estate should not remain to the surrenderor." (o)

But in *Bromfield v. Crowder* it was expressly declared that the circumstance of the devise over being in that case to a stranger made no difference; (p) for it was clear that the testator meant no one to take his estate unless in the event of J. dying under twenty-one. And this opinion is borne out by the other decisions. At all events the distinction taken by Lord Eldon was independent of the nature of the contingency; and the rule of construction appears to be as reasonably applicable where the contingency is that of the devisee being alive when the remainder naturally falls into possession, as where it is the attainment by him of the age which presumably in the testator's mind qualifies him for the possession and legal control.

It will have been seen, however, that in *Finch v. Lane* the devisee was an ascertained individual. Where this is not the case, and the contingency does not exactly fit on to the prior interest, there is greater difficulty in applying the rule. Thus in *Price v. Hall* (q) where after a life estate to A the remainder was to the children of B if he (B) should leave any, and if he left none, over: A died before B; and it was held by Sir W. P. Wood, V. C., that the case was not within the rule. He observed that in *Edwards v. Hammond* and that class of cases, "the gift was to children on attaining a particular age, and the

(n) 2 B. & P. 289.

(o) *Vide ante* p. *533. But this ground, or a nearly identical one, would have existed also in *Doe v. Scudamore* if A, who

was the testator's heir, was heir presumptive at the date of the will.

(p) 1 B. & P. N. R. 325.

(q) L. R., 5 Eq. 399.]

only words of contingency were that if the particular age was not attained, the estate was to go over, the effect of which was that although the estate vested immediately it did not vest indefeasibly until the particular age had been attained. But in *this case the contingency which is introduced does not fit in with the prior interest. In *Doe v. Nowell* all the class was distinctly ascertained and indicated. * * * It is not here a gift to ascertained persons with a gift over, but there was a clear intention that the class should not be ascertained until the death of B, and that all those children who survived B, and those only, should take. By treating it as a remainder vesting immediately in the children living at the death of the tenant for life, it might happen that those children might all die in the lifetime of B, and yet be absolutely entitled, to the exclusion of after-born children who survived B. This was the very class of events not intended by the testator. He meant to give to any children of B whom B might leave living at his death. That was the particular period pointed out for ascertaining the class." The result was that the remainder was contingent, and failed for want of a particular estate to support it.]

And it is impossible to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralizing this clause, is itself not without expressions which favor the suspension of the vesting.

Thus, where (r) a testator devised a certain estate to his wife during her widowhood, remainder to A (his nephew) for life, remainder to the children of A in fee, as tenants in common, and if there should be no child of A living at his wife's death or second marriage, then over; and, by a codicil of even date, the testator directed that neither A nor any issue of A, should, *by virtue of his will, take or be considered as entitled to a vested interest, unless they should respectively attain the age of twenty-one years*; and that, in case of the death of any of such children under such age, then the share of such child or children so dying should go to the surviving brothers and sisters, or brother or sister, their, his or her heirs and assigns, *upon their respectively attaining the age of twenty-one years*. It was contended that the testator, by the clause respecting

Construction controlled by express declaration that devisees shall not take vested interests.

(r) *Russel v. Buchanan*, 7 Sim. 628, 2 Cr. & Mee. 561; compare *Bland v. Williams*, 3 My. & K. 411, stated *post*.

the vesting, intended not to postpone the vesting, but merely to declare when the shares should become absolute and indefeasible, as was shown by the survivorship clause, which otherwise was superfluous, and, accordingly, that the children took vested interests, subject to be divested on their *dying under twenty-one. The Court of Exchequer, however, (on a case from chancery,) certified an opinion that the vesting was postponed until the age of twenty-one. Sir L. Shadwell, V. C. on confirming the certificate, observed that the concluding words showed that the testator had the same intention at the end as at the beginning of the instrument.

The rule of construction under consideration is also excluded by a declaration that the devisee shall take a vested interest at the future period, as such a declaration obviously carries with it an implied negation of an earlier period of vesting. (s)

Declaration postponing earlier vesting, by fixing a future period.

Nor, it seems, does the rule apply where the attainment of the prescribed age is not the only circumstance by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become liable to be divested; but there is a preliminary act to be done by the devisee, in the nature of a condition precedent, before his title accrues. Thus, in *Phipps v. Williams*, (t) the residue of the real estate was devised to trustees, upon trust to accumulate the rents until C should attain the age of twenty-four years, and then to convey unto C, *upon his securing certain annuities* (therein bequeathed) to the satisfaction of the trustees, the legal estate in the testator's freehold, copyhold and leasehold hereditaments; but in case the said C should depart this life before he attained the age of twenty-four years, without leaving issue, then upon certain other trusts. Sir L. Shadwell, V. C., held, upon the principle above suggested, that the devisee derived no interest under the trust, until the attainment of the prescribed age, and the performance of the condition. [Upon appeal, Lord Brougham held, that as the terms of the devise involved no more than the law would have implied, namely, that the devisee must take subject to the annuities, there was no condition precedent, or indeed subsequent either: he admitted, however, that, if there had been, it would have made a great difference in the argument.] (t) ¹¹

Rule of preceding cases not applicable where condition is to be performed by devisee.

(s) *Glanvill v. Glanvill*, 2 Mer. 38; (t) 5 Sim. 44, [3 Cl. & Fin. 665, 9 Bli. (N. S.) 430 (*Ackers v. Phipps*).]
[but see further on this point, § 6 of this ch., *ad fin.*]

11. Where the contingency is by way

But though the devise over has been generally considered as the characteristic of these cases, yet the construction was adopted in *Snow v. Poulden*, (u) where there was no such devise, the words of the will being, "The rest of my property to be invested in land, and given to my grandson; when of age, to have a commission in the army regulars at twenty-one; to remain in *the army seven years, *and not to be of age to receive this until he attains his twenty-fifth year*, and to be entitled to him and his male heirs, bearing the name of F. forever." Lord Langdale, M. R., held, that the grandson took an immediate vested interest as tenant in tail in the land to be purchased, subject to be divested if he should not attain twenty-five; and, consequently, that the rents were applicable to his benefit during his minority.

[No reasons are reported; but the express direction that the property should be "given to" the grandson may well have been taken to constitute an immediate devise independently of the subsequent clause postponing the right of "receipt." But in the two cases next stated there was no such independent gift, nor any express gift over on death

Simmonds v. Cock.

before the prescribed age. (x) Thus in *Simmonds v.*

Cock (y) the testator gave the rents and income of his real and personal estate to his wife for life, and after her death he gave all his real and personal estate unto and to the use of his sons A, B, and C and his granddaughter D, provided she lived to attain the age of twenty-one years, their respective heirs, &c., absolutely. It was held

of a condition precedent, not affecting the person to take, the bequest is considered vested; e. g., a remainder after a life estate on condition of making a certain payment, (after the termination of the life estate, being intended,) *Duncan v. Prentice*, 4 Metc. (Ky.) 216; *Birdsall v. Hewlett*, 1 Paige 32; or in case of B dying insane, *Kirk's Estate*, 6 Phila. 73; or if the first taker die without issue, *Evans v. Davis*, 1 Yea. 332; *Watson v. Woods*, 3 R. I. 326; *O'Driscoll v. Koger*, 2 Desaus. 295; *Jones v. Price*, 3 Desaus. 165; and see other cases cited in note 3, *supra*. But not where the condition raises a contingency as to the person to take; e. g., after life estate a remainder to A's children, and "if they die under age or unmarried," over, *Kuhn v. Webster*, 12 Gray 3; nor where the gift is one of in-

come to a son for five years, with gift of principal after that time, if he reformed, and if not, over, *Smith v. Rockafellar*, 3 Hun 295. In *Butterfield v. Hamant*, 105 Mass. 338, a devise to A, with remainder over, "if he should not outlive B," remains contingent until B's death. So a gift to A, B, and C with remainder to be divided between the survivors, if either die without issue, *Hope v. Rusha*, 88 Penna. St. 127. And see *Colton v. Fox*, 67 N. Y. 348, affirming 6 Hun 49; *Thornton v. Roberts*, 3 Stew. Eq. 473. So a gift to such executors "as shall qualify," *May v. Hill*, 5 Litt. 307; *May v. Slaughter*, 3 A. K. Marsh. 505.

(u) 1 Kee. 186.

(x) And see *Peard v. Kekewich*, 15 Beav. 166; *Attwater v. Attwater*, 18 Beav. 330.

(y) 29 Beav. 455.

that the share of D vested in her immediately, to be divested if she died under age. A devise to A "provided she marries my nephew on or before attaining twenty-one," or "provided she goes to Rome before she attains twenty-one," would, said the M. R., give a vested interest, subject to a condition subsequent: why a devise to A "provided she lived to attain twenty-one" should not also be a condition subsequent he could not understand.

Again, in *Andrew v. Andrew* (z) where a testator devised lands to his son T. for life, "and from and after his decease unto ^{Andrew v. Andrew.} his eldest son if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age; and in default of his having a son, then to the eldest son of testator's son H. forever;" it was held by Sir C. Hall, V. C., that nothing vested in the eldest son of T. until he attained the prescribed age, because there was no express gift over on his dying under that age. The intermediate rents therefore were undisposed of. But this was reversed by the L. JJ. Sir W. James observed that it must be conceded that the words of gift to T.'s eldest son standing alone would have been a mere gift of a future contingent interest. But they were preceded by the life estate to T. and *followed by the words "and in default of his having a son I give and bequeath the same to the eldest son of H. forever;" words which had uniformly been held to mean that the estate was not to go over as long as there was any issue male, and which therefore conferred an estate tail male on T., subject to the previous estate to his eldest son. (b) "There is a long category of cases, from very early times, down to a very recent decision of the M. R., (c) in which the words 'if,' 'when,' 'so soon as,' have been held from the context not to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent, operating as a defeasance of an estate vested, and we should be well warranted by the authorities in so dealing with this case, *inasmuch as the limitations were plainly intended to make a complete settlement* of the property to one for life, then to his eldest son on his attaining twenty-one, with a remainder (*qu.*) over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age) with an ultimate remainder over to another branch of the family. But all doubt and difficulty are removed by the fact that the gift is actually expressed

(z) 1 Ch. D. 410. See also *Jull v. Jacobs*, 3 Ch. D. 703, 713.

(b) See ch. XXXVIII.

(c) *Semb. Simmonds v. Cock; Musket v. Eaton*, 1 Ch. D. 435, stated *post*, was not then reported.

to be what without the express words we should have implied it to be, viz., that the gift is expressed to be 'from and after' the death of T. A man cannot have an estate 'from the death' if he is not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word 'from,' and that in order to make for the testator a most unreasonable will. But taking the word 'from' in its natural meaning, and taking the words apparently contingent to have the meaning which has been so often given to them in so many cases, the whole thing becomes sensible and intelligible. The limitations, therefore, have to be read thus: To T. for life, remainder to T.'s eldest son in fee, (d) with an executory devise in tail to T. if that son should die under twenty-one."

The decision thus turned on the force attributed to the expression "from and after the death;" an expression generally regarded as being equivalent merely to "remainder." The authorities to which the L. J. alluded were probably those which had been cited in argument, viz., *Bromfield v. Crowder*, and others of that class. But save for the principle that words *apparently contingent may be controlled by the context, they are not very closely in point. In them (e) the vesting was inferred from the gift over: in *Andrew v. Andrew* the gift over was inferred from the pre-supposed vesting. (f) *Alexander v. Alexander* (g) was not cited. There, a testator by will, in 1813, devised his "freehold estate at V." to his son T. for life, "and from and immediately after his decease" the testator devised "the same unto the second son of the body of my son T. on his attaining the age of twenty-one years, but in default of there being a second son of the body of my son T., then I devise them to the second son of the body of my son C. on his attaining twenty-one, but in default of there being a second son of the body of my son C. then I devise the same to the second daughter of my son C. on her attaining the age of twenty-one, but in default of

(d) The will bore date 1832, but the fee was held to pass by virtue of the implied gift over on death under age. See ch. XXXIII.

(e) Except in *Simmonds v. Cock*.

(f) Referring to an argument at the bar, the L. J. added, "It assumes that the estate to the son *did not vest* on the father's death. But we hold that it did so vest." This impliedly asserts that the estate was contingent on the son surviving the

father; and some other parts of the judgment, particularly where the words "have an estate" are applied to the two different events of T.'s death and the son attaining twenty-one, would suggest the same construction. But the expressions in question must probably be regarded as mere inaccuracies; as also must the expression "remainder" when used of an estate coming after the son's fee simple.

(g) 16 C. B. 59.

there being a second daughter of my son C., then to the right heirs of my son T." Here the limitations appear as plainly as in *Andrew v. Andrew* to have been intended to make a complete settlement of the property, and the gift to the second son was expressed to be, "from and after" the death of the tenant for life. But it was held that the devise to the second son of T. was a contingent remainder, not a vested estate in fee defeasible on his death under the prescribed age.

Thus the most recent cases show little of the indisposition to extend the doctrine of *Doe v. Moore* which has sometimes been professed, (*h*) and which had in the meantime led to the establishment of a very material distinction between a devise to an individual or to a class, if or when he or they attain twenty-one, with a gift over on death under that age, and a devise to "such of a class as shall attain twenty-one," with a corresponding gift over. Thus in *Festing v. Allen*, (*i*) where there was a devise to the use of the testator's granddaughter for life, and from and after her decease to the use of her children who should attain the age of twenty-one years, if more than one, in equal shares as tenants in common in fee, and if but one, then to that one in fee; and for want of such issue, over. It was contended, on the authority of *Phipps v. Ackers*, that the children took vested estates in fee, subject only to be divested partially in case of other children coming into being, or wholly in case of death under twenty-one. But Rolfe, B., who delivered the judgment of the court, said that in *Phipps v. Ackers*, and the cases there referred to, there was an absolute gift to some ascertained person or persons, and the courts held that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested should be divested, and pass from the first devisee into some other channel; but that here there was no gift to any person who did not answer the whole of the requisite description, and no one who had not attained twenty-one was an object of the testator's bounty any more than a person who was not a child of the granddaughter. Even if there were no authority establishing this to be a substantial distinction the court would not feel inclined to extend the doctrine of *Doe v. Moore*, and *Phipps v. Ackers* to cases not precisely similar. But in fact this distinction in a great measure formed

Distinction between gift to children at twenty-one, and one to children who attain twenty-one.

Festing v. Allen.

(*h*) 9 Cl. & Fin. 592.

(*i*) 12 M. & Wels. 279, 5 Hare 573.

the ground of the decision of *Duffield v. Duffield* (*i*) in D. P., and *Russel v. Buchanan*. It was therefore decided that, as no child of the granddaughter had attained twenty-one when her estate determined, the remainder was defeated for want of a particular estate to support it. (*k*)

Again, in *Bull v. Pritchard*, (*l*) where a testator devised his freehold estates to trustees, in trust for his daughter M. during her life, for her separate use, and after her decease, he directed his trustees to convey the said estates "unto and equally between and among all and every the child and children of his said daughter M. who should live to attain the age of twenty-three *years," in fee as tenants in common; "and, if there should be but one such child, then to such one child" in fee; "but, in case there should be no such child or children, or, being such, all of them should die under the age of twenty-three years without lawful issue, then upon trust" to convey to the persons therein named, Sir J. Wigram, V. C., said there were two classes of cases; one, where the devise was to a party at a given age, and the property was given over if he died under that age; the other, where the description of the devisee was such as to make the given age part of that description; and he held that this case fell under the second class. It was not, he added, necessary for him to say whether greater violence would be done to the language of the will in that case than was done in some of the cases of the first class, as, for example, in *Doe v. Moore*: (*m*) the two cases were *in principle* widely different from each other. The V. C. also held, that a clause contained in the will, directing the trustees to apply each child's share, or so much thereof

(*i*) 1 D. & Cl. 268, 314, 3 Bli. (N. S.) 260. See also *Newman v. Newman*, 10 Sim. 51; *Wills v. Wills*, 1 D. & War. 439.

(*k*) But as there were infant children who might attain twenty-one, the event on which the alternative remainder was limited had not happened, so that this remainder also failed. See now 40 and 41 Vict., c. 33, stated *post* ch. XXVI.

(*l*) 5 Hare 567. See also *Stead v. Platt*, 18 Beav. 50; *Holmes v. Prescott*, 33 L. J., Ch. 264, 10 Jur. (N. S.) 507 (in which Wood, V. C., examined the authorities); *Perceval v. Perceval*, L. R., 9

Eq. 386 (same will); *Rhodes v. Whitehead*, 2 Dr. & Sm. 532; *In re Eddel's Trusts*, L. R., 11 Eq. 559; *Brackenbury v. Gibbons*, 2 Ch. D. 417 (where, however, there was no gift over.) These cases have virtually overruled *Browne v. Browne*, 3 Sm. & Gif. 568; *Riley v. Garnett* 3 De G. & S. 629; *Doe d. Bills v. Hopkinson*, 5 Q. B. 223, as to which see per Wood, V. C., in *Ex parte Styant*, Johns. 387, and in *Holmes v. Prescott*, *sup.*, and *post* ch. XL., § 3.

(*m*) See also, per Sir W. Grant, M. R., *Leake v. Robinson*, 2 Mer. 386.]

as they might deem necessary, towards their maintenance, did not vary the case.¹²

But there are no words so plain but they may be controlled by the context: (*n*) and in *Muskett v. Eaton*, (*o*) where a testatrix devised a farm to A for life, and in the event of his leaving a lawful son born, or to be born in due time after his decease, who should live to attain the age of twenty-one years, unto such son and his heirs if he should live to attain the age of twenty-one years; but if A should die without leaving a son who should live to attain the age of twenty-one years, then, after the death of A, to B and his heirs. A died, leaving an infant son; and Sir G. Jessel, M. R., held that the case was not within the rule in *Festing v. Allen*. He said, "The testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he *could* not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the son takes a vested estate subject to be divested in the event of his dying under twenty-one."

*It will be observed that the actual words of gift (*p*) are "to such son if he shall live to attain twenty-one," and that "such son" must here mean "son of A born or to be born," exclusive of the qualification "who shall live to attain twenty-one," because the testator goes on to add that very qualification, so far as he intends it to be one—"if he shall attain twenty-one." So that on this ground alone the case was not within *Festing v. Allen*. The intention was made by the M. R. to depend on the rule of law which requires a continuing particular estate to support a contingent remainder: there was nothing else to suggest that the testatrix intended that the devisee should be twenty-one at the time when the particular estate determined. Generally, it is only when the words of the will are ambiguous that the construction of them can properly be governed by such considerations. The rule itself is now abolished by statute.] (*q*)

It was at one period doubted whether a devise to a person *after pay-*

12. See *ante* note 6, p. 417, and cases there cited.

[*n*] Per Wood, V. C., *Holmes v. Prescott*, 33 L. J., Ch. 271.

(*o*) 1 Ch. D. 435.

(*p*) See also *Bradley v. Barlow*, 5

Hare 589, where the clear terms of contingency occurred in the maintenance clause, not in the gift of the legacy.

(*q*) 40 and 41 Vict., c. 33. See ch. XXVI.]

Devises after
payment of
debts.

ment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge. (r) 13

General re-
mark on pre-
ceding cases.

The several preceding classes of cases clearly demonstrate that the courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and, agreeably to the maxim, *exceptio probat regulam*, they confirm, rather than oppose, the doctrine that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider.

III.—The first remark suggested by this class of cases is, that an estate limited in clear terms of contingency. estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however *inconsistent with what it may be conjectured would have been the testator's actual meaning, if his attention had been drawn to those consequences.

Thus, in *Denn d. Radcliffe v. Bagshaw*, (s) where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and the heirs male of such first son, remainder to the other sons successively in tail, in like manner, remainder to testator's nephew in tail. M. had issue an only son, *who died in her lifetime*, leaving issue. Whether such issue was entitled under the devise in tail (t) to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter;

(r) *Barnardiston v. Carter*, 1 P. W. 505, 509, 3 B. P. C. Toml. 64; see also *Bagshaw v. Spencer*, 1 Ves. 142; and some very able opinions stated 1 Coll. Jur. 214. Those of Lord Eldon (then Sir John Scott) and Mr. Fearne, are particularly worthy of attention.

13. A bequest to the widow for life, and

after her death, and the payment of debts and the education of A and B, to them, is vested, *Bowling v. Dobyn*, 5 Dana 434.

(s) 6 T. R. 512; see also *Wingrave v. Palgrave*, 1 P. W. 401 (arising on the limitation of a term in a settlement.)

(t) For such it clearly would have been. See *infra*.

and that, to accomplish this intention, the court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth; and that the words, "if living at the time of her death," merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the court (reluctantly, on account of the hardship of the case,) (*u*) decided, that the son not having survived his mother, his estate never arose. Lord Kenyon observed, that the cases cited for him proceeded on informal words; whereas here correct and technical expressions were used throughout. (*x*)

So, in *Holmes v. Cradock*, (*y*) where a testator devised freehold, copyhold, and leasehold estates to F., his heirs, &c., upon trust to pay testator's wife an annuity of £100 for her life, and to pay the residue of the annual profits to testator's son W. during the life of his mother; and if his son should happen to die before his mother, without leaving a widow or child, then in trust to pay all such profits to her for life, and subject to the said trusts, that the said F. should stand seized to the use of the testator's said son, his heirs and assigns, forever, subject and chargeable with *the legacies thereafter given. In a subsequent clause he proceeded thus:—"And if my son shall die, *leaving my wife*, without leaving a wife or any child, after his death *and my wife's*, I give and bequeath," certain legacies, "which I charge upon my real estate, hereinbefore limited to my son and his heirs." The son survived his mother, and died without leaving wife or child; and Sir R. P. Arden, M. R., held, that the legacies did not arise, on the ground that he was not warranted in totally rejecting words, unless they were repugnant to the clear intention manifested in other parts of the will. (*z*)

Devises held to be contingent, notwithstanding absurd consequence.

Suggestion to persons taking instructions for wills as to suspending the vesting.—(*u*) Persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the meantime, *leaving issue*, is in the testator's contemplation. It is probable that in general this event is overlooked; and that if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in

case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event.

[(*x*) Cf. *Jenkins v. Hughes*, 8 H. L. Cas. 571, an informal will.]

(*y*) 3 Ves. 317; [see also *Vick v. Suetter*, 3 Ell. & Bl. 219.]

Remark on *Holmes v. Cradock*.—

(*z*) But was there not ground to contend, on the principle of *Pearsall v. Simpson*, and that class of cases, (*ante* p. *807,) that the devise might be read "if my son shall die without leaving a wife or child, then after his decease, *and after my wife's de-*

So, in *Shuldham v. Smith*, lessee of *Matthews*, (a) where a testator devised to certain persons for life, and after the death of the survivor unto all and every the children of his late sister C., by her three several husbands (naming them,) *that should be then living*, and to their heirs and assigns, equally to be divided between them as tenants in common, and not as joint tenants; *and if there should be but one such child, and no issue of any of the other children then living*, then, and in that case, he devised his real estate unto such surviving child, his or her heirs and assigns forever. At the death of the surviving tenant for life, one child of C. only was living, but there was issue of several of the other children. It was held in D. P. that in this event the remainder in fee was undisposed of. Lord Eldon said, you cannot, by implication or supplying words, give the whole to one child, in an event in which the testator has said, that such one child shall not have it, (b) nor divide the estate into different aliquot parts between one child and the issue of the others, where the testator has not told you what aliquot part is to be given to one, and what to the issue of the others. Lord Redesdale observed, that the testator had provided for the event of there being more than one child, and that of there being only one and no issue of the others then living. The third event, however, was that which had happened, and in that event there was no disposition.

*[And in *Maddison v. Chapman*, (c) where a testator directed that, when the youngest of his two daughters had attained twenty-one, his real and personal estate should be divided into three equal parts, one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; provided, that if either of his two daughters should die before a

Limitation
over construed
strictly and
held to fail,
event not
having hap-
pened.

cease, if he shall die leaving my wife?" There can be little doubt that Sir W. Grant would so have construed it. It is observable, that neither *Webb v. Hearing*, nor the anonymous case in *Ventris* 363, was cited to Sir R. P. Arden, who relied much on *Calthorpe v. Gough*, cit. 3 B. C. C. 395, and *Doo v. Brabant*, 3 B. C. C. 393, 4 T. R. 703.

(a) 6 Dow. 22, [Sug. Law of Prop. 416; see also *Parsons v. Parsons*, 5 Ves. 578; *Dicken v. Clarke*, 2 Y. & C. 572; *Clarke*

v. Butler, 13 Sim. 401; *Lenox v. Lenox*, 10 Sim. 400.]

(b) That is, not expressly, but constructively by giving to one, if there should be no issue of the others; for it is observable that, if it had stood upon the former part of the devise alone, the sole surviving child would clearly have taken.

[(c) 4 K. & J. 709. See also *Coulthurst v. Carter*, 15 Beav. 421, fourth point; *Pride v. Fooks*, 3 De G. & J. 252.

division of his property should have been made, and having no surviving issue, then the part of the deceased should go to the surviving sister. By a codicil, the testator provided that *if both his children should die in their minority*, (d) and leave no issue, then in such case, and in such case only, he gave the whole of his property to his wife for life with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age, and without having been married. It was held by Sir W. P. Wood, V. C., that whether the interests under the will were vested or not, (e) and whether a reasonable motive could or could not be assigned for the condition upon which the testator had made the limitation over in the codicil to depend, that condition must be construed strictly, and that, this event not having happened, the limitation over failed. "The condition," said the V. C. (viz., the death of the elder daughter during minority,) "is not merely an event essential to the determination of the interest previously given to her, but involves a further incident, which may or may not have happened when that estate is determined." (f) When I find a testator expressing this varied contingency, by his will giving an interest which may be determined by a death after minority, and by his codicil making a limitation over which is only to take effect in the event of death during minority, it is impossible to know what he intended, or to foresee what he would have said had it been called to his attention that the two limitations did not coincide."]

The same rigid rule of construction prevails, where a testator has disposed of an estate in a certain event only, under the erroneous impression, that his power of disposition is confined to such contingency.

Where testator devises upon contingency, misconceiving the extent of his power of disposition.

Thus, in *Doe d. Vessey v. Wilkinson*, (g) where lands had been *settled on A for life, remainder to trustees, to raise, in case W. or any of his issue should be living at her (A's) death, £1000 for such persons as A should appoint, remainder to W. for his life, remainder to his children in tail, remainder to A in fee. A by will, reciting the settlement, gave the £1000 in case W. or any of his issue should be living at the time of her death, to B. She then proceeded to declare, that "*in case neither the said W., nor any issue of his, should be living at the time of her decease, by which event the premises would devolve upon*

(d) "Minority" was construed in its ordinary sense; not, as contended for, the period until the youngest daughter attained twenty-one.

(e) The court, however, thought they were vested.

(f) See *ante* p. *809.]

(g) 2 T. R. 209.

her and her heirs," then she gave the same to trustees for five hundred years, to raise certain sums of money within six months after her decease; and from and after the expiration or other sooner determination of the said term, and subject thereto, the testatrix gave the premises to her brother for life, with remainder to her (testatrix's) daughter C in fee; but if she died before twenty-one and without issue, to her son-in-law B in fee, he paying certain legacies. W. *survived the testatrix*, and afterwards died without issue; and the question was, whether in that event the devises took effect. The court agreed that the limitation of the term was void in event; and Grose, J., and Ashurst, J., held that the devise of the inheritance was dependent on the same contingency. Buller, J., did not deny effect to the words of contingency, but confined them to the term, holding it to be a vested devise of the inheritance, subject to a contingent term. (h) The argument that the testatrix might not be aware of her power to dispose of the estate, in case of the death of W. without issue after her death, and that, had she been so, the whole of the will showed that she would have given it to W., was conclusively answered by Grose, J., who said that, "if she was not aware of her power to give, she did not intend to give; and then the law gives it to the heir, and we cannot take it from him. If she had known her power to dispose of it, she possibly would have given it, and probably might, but she has not said so; and if we were to say so, it would be our will, and not hers."

Still, however, where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the court will struggle to avoid such a construction.

Where holding the devise to be contingent, will defeat the declared object of the testator.

Thus, in *Bradford v. Foley*, (i) where the devise was in trust *for the testator's son for life, and after his decease unto the first and every other son which he (the son) should have by any future wife in tail; remainder to the daughters of such future marriage in fee; with a proviso, that if his son should thereafter marry with any woman related in blood to M. his then wife, all the above uses, so far as they related to the issue of such future marriage, should cease and determine, it being the testator's steadfast resolution, to hinder that no person any-ways of kin to her in blood, or born or descended from any such per-

(h) As to this point, see *infra*, § 4.

exactly the converse of *Driver v. Frank*

(i) *Doug.* 63. This case seems to be *v. Frank*, 3 M. & Sel. 25.

son, should inherit any part of his said estate; and *in such case*, notwithstanding there should be issue of his said son by such future marriage, living at the time of his (testator's) decease, it was his will that neither they, nor either of them, should take anything under his will; *but that* the trustees should stand seized to the use of his (the testator's) brother's children, living at his decease, and their heirs; and in case they should all die in his lifetime, or after his decease, without issue, then he devised his said real estate to his own right heirs: he meant such heirs only as should be in no ways related in blood to the said M., all of whom he thereby excluded from any right, title, or benefit, from his estate. (*k*) The son died without marrying again. It was contended, that in this event the ulterior estates never arose; but the court held, that the testator's brother's children were tenants in tail. Lord Mansfield said nothing could be clearer than that the testator meant that no child of M. should take in any event; and yet, according to that argument, such child, if there had been one, must have taken (as heir-at-law.)

The words in this case were certainly very strong, and to a judge less disposed than Lord Mansfield to relax the strict rules of construction, they probably would have appeared to Remark on
Bradford v.
Foley. present an insuperable difficulty to holding the testator's brother's children to take in any other event than that of the son's future marriage, especially as this construction extended the devise beyond what was absolutely necessary to effectuate the testator's professed object, namely, the exclusion of the obnoxious persons. He might have intended the devise in question to take effect only in case such persons came *in esse*. The case, however, stands distinguished from the others before noticed, in the fact, *that the devise in its literal terms was inconsistent with a scheme, not merely conjectured, but avowed by the testator. (*l*)

[So, in *Quicke v. Leach*, (*m*) a testator devised lands to his wife until his son J. attained the age of twenty-five, "and in case his said son

(*k*) It seems that these words would not have amounted to a devise to the persons next in descent, *Goodtitle d. Bailey v. Pugh*, 3 B. P. C. Toml. 454. Consequently, a son or other relation of M., being the testator's heir, would have taken the reversion by descent, notwithstanding this clause. Nothing will exclude the heir, but an actual disposition

to some other person, [*ante* p. *623.]

[(*l*) This case is given by Fearn (C. R. 234) as an example of a limitation after a preceding estate, which preceding estate depends on a contingency which never happens, taking effect notwithstanding.

(*m*) 13 M. & W. 218.

should attain his age of twenty-five and he (testator) should have any other child or children of his body living at the time of his death or that should be afterwards born alive," he devised his lands to trustees for one thousand years upon the trusts thereafter expressed; and subject thereto, to his son J. for life with remainders over in strict settlement. The trusts of the term were declared to be for raising £5000 as portions for the testator's children, other than the eldest, that he might happen to leave at his death; but if all his children except an eldest should die before their respective ages of twenty-five and twenty-one, then the sum of £5000 was not to be raised; "provided always, that in case I shall leave no younger child or children, or being such, all of them shall die before the said respective ages of twenty-five or twenty-one years, or in case the said sum of £5000 be raised, then the said term of one thousand years shall cease, determine and be utterly void." J. attained the age of twenty-five, and was the only child whom the testator left surviving him. The question was whether the devise of the term had failed. It was held that it had not; for there were two circumstances by which the testator had satisfactorily shown that he intended the term to take effect at his death in all events; first, the clause of cesser provided that the term should cease on certain contingencies, one of which was the testator's not leaving any younger child. Such a proviso would be useless and unmeaning if, unless he left a younger child, the term was never to come into existence. A term which never existed could not possibly cease. (n) The other circumstance was this: One of the trusts of the term was, that if the testator's wife should die before J. attained twenty-five, the trustees should allow him a sum not exceeding £400 per annum for maintenance. This trust could only be performed by means of the term, and therefore necessarily pre-supposed its existence: and it was a trust not made to depend by any necessary or reasonable construction of the words used on the event of there being a younger child.]

As a devise expressly made to take effect on a contingency will not

Vested gift not
divested, un-
less all the
events happen.

arise unless such contingency happen, it follows *a fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted

(n) But the term was to "cease, determine and be void" upon any one of three events; 1, there being no younger child-

ren; 2, their dying under age; or, 3, the money having been raised. Might not the words have been read distributively?

devise happen. (o) And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. ¹⁴ Thus, if a devise be made to A, to be divested on a given event in favor of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto.

Thus, in *Harrison v. Foreman*, (p) where a fund was bequeathed to A for life, and after her decease to P. and S. in equal moieties; and in case of the death of either of them in the lifetime of A, then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir R. P. Arden, M. R., held, that the original gift was not defeated.

So, in *Sturgess v. Pearson*, (q) it was held, that a gift to a person for life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favor of those (r) who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives.

And the same construction has sometimes been applied in cases, where the intention that the survivors (in whose favor the original gift was divested) should be living at the time of distribution, was less clearly marked.

As, in *Browne v. Lord Kenyon*, (s) where the testatrix gave *£1000 to which she was entitled by virtue of a deed of settlement (and which it seems was charged upon land,) upon trust for several persons successively for life, and after the death of the survivor, upon trust to pay the principal to C.; but "if he be

Devise not divested by contingent clause which fails.

(o) Co. Lit. 219 b;] *Doe v. Cooke*, 7 Beav. 60; *Peters v. Dipple*, 12 Sim. 101; *East* 269, *ante* p. *521; *Doe v. Rawding*, 2 B. & Ald. 441, *ante* p. *522; see also *Clarke v. Lubbock*, 1 Y. & C. C. C. 492; *Eaton v. Barker*, 2 Coll. 124; *Benn v. Doe d. Usher v. Jessep*, 12 East 288; *Dixon*, 16 Sim. 21; *Walker v. Simpson*, 1 K. & J. 719;] and see *Hulme v. Hulme*, 9 Sim. 644, stated *post* ch. XXVI.

14. *Hawkins on Wills* 240.

(p) 5 Ves. 207.

(q) 4 Mad. 411; [*Kimberley v. Tew*, 4 D. & War. 139; *Masters v. Scales*, 13

[(r) In re *Clark's Trusts*, L. R., 9 Eq. 378.]

(s) 3 Mad. 410.

then dead" (which event happened,) then to his two brothers in equal shares, *or the whole to the survivor of them*. Both the brothers survived the testator, and died pending the prior life interests. Sir J. Leach, V. C., held, that they took vested interests at the death of the testator, subject to be divested *if one only should survive the tenants for life*; though he intimated a doubt, whether the testatrix did mean that either brother should take any interest without surviving the tenants for life; but his Honor said, the force of the expression was otherwise.

So, in *Belk v. Slack*, (t) where a testator gave the residue of his real and personal estate to trustees, upon trust for A for life, and after the decease of A and B he gave the same to C and D, to be equally divided between them, share and share alike, *or to the survivor or survivors of them*. C and D both died in the lifetime of A and B; and it was held that their respective representatives were entitled to the several moieties of the residue.

[Where by the word "survivor" is denoted, not one who shall be living at a defined point of time, but only one of several devisees who outlives the other or others, the construction is of course inapplicable. Thus, in *White v. Baker*, (u) where the gift was to A for life, and after his death to B and C equally, and in case of the death of either of them in the lifetime of A, the whole to the survivor of them; it was held that the word "survivor" referred to the event of one of the two persons, B and C, surviving the other, and consequently that on the death of B in the lifetime of A, the whole vested indefeasibly in C, although the latter also died before A.

The strictness of construction put upon a gift divesting a previous vested interest is further exemplified by *Templeman v. Warrington*, (x) where a testatrix bequeathed her residue in trust for A for life, and after her death in trust for her children; but *in case there should be but one child at A's death then to go to that one, and on failure of issue, as A should appoint. A had eleven children, three of whom

(t) 1 Kee. 238; see also *Jackson v.* to "survivors" are treated at large.

Noble, 2 Kee. 590, *post*; [*Aspinall v. Audus*, 7 M. & Gr. 912; *Littlejohns v. Household*, 21 Beav. 29; *Page v. May*, 24 Beav. 323, (correcting *Macdonald v. Bryce*, 16 Beav. 581); *Cambridge v. Rous*, 25 Beav. 415; and see and consider *Gibson v. Hale*, 17 Sim. 129.

(u) 2 D., F. & J. 55. See this case cited again, ch. XLVII., § 3, where gifts

(x) 13 Sim. 267; see also *Bromhead v. Hunt*, 2 J. & W. 459; *Gordon v. Hope*, 3 De G. & S. 351; and *Terrell v. Cooke*, 5 L. J., Ch. (N. S.) 68; *In re Minor's Trust*, 28 Beav. 50, (settlement); *Corneck v. Wadman*, L. R., 7 Eq. 80. See also *Skey v. Barnes*, 3 Mer. 334; *Hope v. Potter*, 3 K. & J. 212; *Malcolm v. Malcolm*, 21 Beav. 225.

died in her lifetime; and it was held that as there were more children than one living at A's death, the deceased children were not divested of the interests which they took under the primary gift

And in *Strother v. Dutton*, (y) where a testator gave to his daughter R. £1000 to be invested and the interest to be paid to her for her life, and at her death to be called in and distributed equally amongst her children; "in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living." R. had several children, of whom four died in her lifetime without issue; and it was held that the shares which vested in them on their births, were not divested; for the gift in favor of the issue of the children who had issue, did not affect the shares of the children who died without leaving issue.

The principle of the foregoing authorities prevails not only where the original gift is vested, but also where it is contingent, provided the contingency be not such as to prevent the contingent interest from being transmissible. (z)

It will be observed that if the prior devise creates an estate tail, the owner of it, if it be vested, may, by executing a disentailing deed, defeat the gift over; but this is no reason for importing the contingency into the prior gift in order to preserve the gift over.] (a)

Where a gift to several persons or such of them as shall be living at a certain time, is followed by limitations over in case of their dying under alternative circumstances, (for instance, under twenty-one leaving issue, and under twenty-one without issue,) these executory gifts are held to apply only to the shares of objects who are living at the prescribed period; to decide otherwise would be to reduce the words, "or such of them as shall be then living," to silence. (b)

(y) 1 De G. & J. 675. See also *Baldwin v. Rogers*, 3 D., M. & G. 649; *Etches v. Etches*, 3 Drew. 447, 2d point; In re *Bennett's Trusts*, 3 K. & J. 280; but cf. *Stuart v. Cockerell*, L. R., 5 Ch. 713; *Read v. Gooding*, 21 Beav. 478.

(z) *Wagstaff v. Crosby*, 2 Coll. 746; In re *Sanders' Trusts*, L. R., 1 Eq. 675, (dissenting from *Willis v. Plaskett*, 4 Beav. 208.) When contingent interests are transmissible, and when not, is pointed out at the close of the chapter.

(a) *Davies v. Richards*, 13 C. B. (N. S.) 69, 861.]

(b) *Howes v. Herring*, 1 M'Cl. & Y. 295. The rule, that estates vested are not to be divested unless all the events upon which the property is given over happen, seems to have been generally adhered to, although an absurd and whimsical intention be thereby imputed to the testator. See *Graves v. Bainbridge*, 1 Ves., Jr., 562. [But where the original gift is in ambiguous terms which

*IV.—When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them. (c)

In *Moody v. Walters*, the limitations in a marriage settlement were to the husband and wife successively for life, remainder to the first and other sons in tail male; with remainder, *in case he (the husband) should die without leaving any issue male then born, and alive, and leaving his wife with child*, to such after-born child or children, if a son or sons: remainder to the brother of the settlor for one hundred and twenty years, if he should so long live; remainder to trustees for preserving contingent remainders; remainder to his first and other sons in tail male, with reversion to the settlor in fee. Lord Eldon expressed a strong opinion (though the case was not decided on the point,) that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it. Such, he thought, would have been the construction, had it been a will.

Instances in which a contingency has been restricted to the immedi-

may import contingency, the conclusion that this is their true import is aided by the improbability of the testator intending to make the vesting or indefeasibility of a legacy to a class, depend on whether one or two only of the class survive a given period, *Shum v. Hobbs*, 3 Drew. 101; *Daniel v. Gossett*, 19 Beav. 478 (as to which, however, see *L. R.*, 7 Eq. 82;) *Selby v. Whittaker*, 6 Ch. D. 239.]

(c) *Davis v. Norton*, 2 P. W. 390; *Doe d. Watson v. Shippard*, Doug. 75, stated Fea. C. R. 236; *Moody v. Walters*, 16 Ves. 283; [*Toldervy v. Colt*, 1 Y. & C. 240, 627, 1 M. & Wels. 250; the same rule applies to personalty, *Lett v. Randall*, 10 Sim. 112; *Fitzhenry v. Bonner*, 2 Drew. 36; *Cattley v. Vincent*, 15 Beav. 198; *Gray v. Golding*, 6 Jur. (N. S.) 474.]

ate estate are of two kinds. First, where the words of *contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others.

Contingency confined to particular estate.

As, in *Horton v. Whittaker*, (d) where A, by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, *unless she happened to survive him*, want any assistance to enable her to live in the world, he devised his estates to trustees, in trust during the life of M., to pay the rents to his (the testator's) sisters T. and B.; and after the decease of W., *in case his (the testator's) sister M. should be then living*, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held, that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

Where the words are referable to particular estate only.

Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series, in the nature of remainders, but assume the form of substantive independent gifts. As, in *Lethieullier v. Tracy*, (e) where A devised land to his daughter for life, remainder to her first and other sons in tail; and, if she should depart this life without issue of her body *living at her death*, then he devised the land to trustees and their heirs, until N. should attain twenty-one, upon certain trusts. *Item—the testator gave and devised* the land in question to N., after he should have attained his age of twenty-one years, for his life, with remainders over. Lord Hardwicke held, that the contingency of the daughter dying without issue *living at her death* affected only the estate limited to the trustees until N. attained twenty-one, and not the subsequent limitations. He took the words, “Item—I give and devise,”

Where the limitations of ulterior estates stand as independent gifts.

(d) 1 T. R. 346; see also *Napper v.* 184.]

Sanders, Hutt. 119; *Bradford v. Foley*, Doug. 63, stated *ante* p. *824; [*Doe d. Lees v. Ford*, 2 Ell. & Bl. 970; *Doutty v. Laver*, 14 Jur. 188; *Darby v. Darby*, 18 Beav. 412; *Eaton v. Hewitt*, 2 Dr. & Sm.

(e) 3 Atk. 774, Amb. 204; and see *Aislabie v. Rice*, 3 Mad. 256, 3 J. B. Moo. 358, 8 Taunt. 459, stated *infra*; but see *Doe v. Wilkinson*, 2 T. R. 209, *ante* p *823.

&c., as a substantive devise, and not at all relative to the former devise to the trustees, on the contingency of the daughter dying without issue at her death.

*[So, in *Pearson v. Rutter*, (*f*) where a testator devised his messuage and farm at S. to trustees in trust for his grandson Robert in tail, and and if he should die under age and without issue, then in trust for the testator's son Richard for his life, and after his decease, in trust for M. during widowhood, "and subject to the trusts hereinbefore thereof declared," in trust for A and B; Robert died without issue, but having attained twenty-one, so that the trusts in favor of Richard and M. failed; (*g*) but Lord Cranworth held, that the ultimate trust was to be read independently of the former clause, upon the same principle that, in the case of *Lethieullier v. Tracy*, the "item" clause was treated as a fresh departure, and a start upon a new disposition.

And in *Boosey v. Gardener*, (*h*) where a testator bequeathed to his two sisters the interest of his long annuities for their lives, and in case of one or both of their deaths before his, he gave the whole interest in long annuities to his brother for life; at his death the testator gave half of the capital to his niece A, his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; likewise the testator bequeathed to his nephew S., his brother's son, if not further family, the other half; in case of further family, to be divided between them, not dividing the half left to A: it was held that the bequest to the niece and nephew, were not contingent upon the deaths of the sisters in the testator's lifetime. Turner, L. J., was not prepared to say, that if the question had depended only on the disposition in favor of the niece immediately following on the disposition in favor of the testator's brother, the interest of A might not properly have been held to depend on the contingency, but that the disposition in favor of the nephew could not, upon a sound construction of the will, and having regard to the foregoing authorities, be held to be governed by the words of contingency, so far as the nephew was concerned; and if not as to him, neither could the disposition in favor of the niece; for the two dispositions were connected together, and formed part of one scheme.

[*(f)* 3 D., M. & G. 398; approved by Lord St. Leonards, and not appealed on this point, *Grey v. Pearson*, 6 H. L. Cas. 61, 103. (*h*) 5 D., M. & G. 122. See also *Quicke v. Leach*, 13 M. & Wels. 218; *Sheffield v. Earl of Coventry*, 2 D., M. & G. 551.

(*g*) *Vide ante* p. *511.

It is not, however, to be assumed that whenever the word "item," or "likewise," begins a sentence, it creates a complete severance of all that follows from the previously-expressed con*tingency. ^{Observations on word "item."} It cannot be put higher than this, that such expressions make a *prima facie* case for the disconnection, which the context of the will may either maintain or rebut. In *Lethieullier v. Tracy*, Lord Hardwicke said that if the legal estate had been given to the daughter and her issue, and then after these words the whole had been given to trustees, and all the subsequent limitations had been only declarations of that trust, in such case these words (of contingency) would have extended to the whole.

And in *Paylor v. Pegg*, (i) where a testator gave to trustees in trust for his son until he attained twenty-one, or was able to make a will himself, all his estate, lands, &c., and after a specific bequest of furniture to his wife, the testator bequeathed to her £20 a year so long as she should continue his widow if his son were living, and if his son should die before twenty-one, he empowered his wife to hold his estate for her life, if she continued his widow, but if she should intermarry, he gave her only £10 a year for her life, if his son should be then living. *Likewise* he empowered two other trustees at the death of his wife to sell his real and personal estate, and distribute the proceeds to his wife, his nephews and nieces, and others. It was held by the M. R., notwithstanding the word "likewise," that the power of sale was governed by the same contingency as the gift to the widow, viz., the death of the son under twenty-one. He was satisfied it was not the intention of L. J.J., in *Boosey v. Gardener*, to decide that wherever the word "likewise" occurred, the contingency which governed the previous gift was not to govern that which followed, if the subject matter was clearly connected.] ^{Effect of word "likewise."}

V.—The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty. ^{Vesting of bequests of personal estate.} Whatever difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the ecclesiastical courts, who [formerly] (k) possessed, in common with courts of equity, a jurisdiction for

(i) 24 Beav. 105.

(k) This jurisdiction was abolished by 20 and 21 Vict., c. 77, § 23.

the recovery of legacies and distributive shares of personal estate.

Pecuniary legacies charged on land. (*l*) are, so far as they come out of the real estate, to be considered as dispositions *pro tanto* of that species of property. (*m*)

A pecuniary legacy, whether charged on land or not, given to a person *in esse* simply, *i. e.*, without any postponement of payment, is, of course, vested immediately on the testator's decease. In regard to sums payable out of land *in futuro*, the old rule was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land if the devisee died before the time of payment; (*n*) but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A, to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment; (*o*) and that too, though interest in the meantime be given for maintenance. (*p*) But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A for life, remainder to B in fee, charged with a legacy to C, payable at the death of A, the legacy will vest *instantly*; and, consequently, if C die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A, in order that he may in the meantime enjoy the land free from the burthen. (*q*) ¹⁵

Distinction where payment is postponed with reference to circumstances personal to devisee, and where for convenience of the estate.

Leaseholds and proceeds of land.—

(*l*) Leaseholds are not land for this purpose, *In re Hudsons*, 1 Dru. 6; nor is money to arise from the sale of land, *In re Hart's Trust*, 3 De G. & J. 195; *Turner v. Buck*, L. R., 18 Eq. 301.

(*m*) *Duke of Chandos v. Talbot*, 2 P. W. 602; *Jennings v. Looks*, Id. 276; *Prowse v. Abingdon*, 1 Atk. 482; *In re Hudsons*, 1 Dru. 6.]

(*n*) 2 Vern. 439; Pre. Ch. 195; 1 Eq. Cas. Ab. 267, pl. 2; [Pre. Ch. 290]; 3 Atk. 112; 1 Atk. 482. The ground of this rule, it should seem, was that the

inheritance might not be unnecessarily burthened.

(*o*) *Gawler v. Standerwicke*, 1 B. C. C. 105, n., 2 Cox 15; *Harrison v. Naylor*, 3 B. C. C. 108, 2 Cox 247; *Phipps v. Lord Mulgrave*, 3 Ves. 613; but see *Jackson v. Farrand*, 2 Vern. 424, [1 Eq. Cas. Ab. 268, pl. 8; this case is said to have been termed anomalous by Lord Hardwicke, *Cotton v. Cotton*, Id., n., 1 Atk. 486.]

(*p*) *Pearce v. Loman*, 3 Ves. 135; [*Gawler v. Standerwicke*, *ubi sup.*; *Parker v. Hodgson*, 30 L. J., Ch. 590.]

(*q*) 3 P. W. 414; Cas. temp. Talb. 117;

15. Where the postponement is for the benefit of the estate and not of the donee, the gift is considered to be a vested one, *Herbert v. Post*, 11 C. E. Gr. (N. J.) 278,

affirmed 12 C. E. Gr. (N. J.) 540; *Warner v. Durant*, N. Y. Ct. App., 19 Alb. L. J. 279; *Loder v. Hatfield*, 71 N. Y. 92, 99; *Birdsall v. Hewlett*, 1 Paige 32; *Harris v. Fly*,

But either of these *rules of construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency, which might, abstractedly viewed, appear to spring from considerations personal to the legatee, as in the case of a sum of money directed to be raised for a person at the age of twenty-one; yet the vesting will take place immediately on the testator's decease, if such be the declared intention. (r) And if such

1 Eq. Cas. Ab. 112, pl. 10; Com. Rep. 716; 2 Atk. 127, 507; 3 Atk. 319; 1 Ves. 44; Amb. 167, 230, 266, 575; 1 B. C. C. 119, n., 124, n., 192, n.; Dick. 529; 1 B. C. C. 119; Id. 191; 9 Ves. 6; 4 Sim. 294; 2 Y. & C. 539; [2 Y. & C. C. C. 134; 3 Hare 86; 7 Id. 334; 1 M., D. & D. 418; 2 Id. 177; 1 H. L. Cas. 43, 57; and see *Remnant v. Hood*, 2 D., F. & J. 396.] **MS. case of Oakeley v. Kitchener.**—In *Oakeley v. Kitchener*, in Chancery, March, 1827, (with a MS. note of which the writer has been favored,) a testator devised to his wife an annuity for her life out of his real estate, and, subject thereto, devised his real estate to trustees for five hundred years to raise his debts and legacies. He gave a legacy of £1000 to each of his four younger children, payable at twenty-one, as to sons, and twenty-one or marriage, as to a daughter, with interest in the meantime, to be applied for their maintenance. He also gave them a further legacy of £1000 each to be paid *within six months after the death of the wife*, payable at twenty-one, or marriage, as before, with interest from her death. There was (though the fact does not appear to be very material) a gift over of the respective legacies on the death of the sons before twenty-one, with-

out issue, or the daughters unmarried, to the survivors. It was held, that the vesting of the second series of legacies was not postponed until the decease of the wife, and therefore did not fail by the decease of the children during her life.

This case, it will be perceived, agrees with the general distinction stated in the text, as the charge was evidently postponed until the death of the annuitant for the convenience of the estate. [See also *Brown v. Wooler*, 2 Y. & C. C. C. 134. Of course it makes no difference in the construction, that the remainderman, whose interest is charged with the legacy, dies before the tenant for life. The interest passes, *cum onere*, to the heir, *Morgan v. Gardiner*, 1 B. C. C. 193, n. But in *Taylor v. Lambert*, 2 Ch. D. 177, a legacy, charged on land devised to A in fee, but not to be raised "until A come into actual possession of the M. estate," (of which he was then tenant for life in remainder,) failed through A dying before the tenant for life in possession of that estate. The "convenient" time was always *uncertain* and never arrived. See analogous rule as to personalty, *Atkins v. Hiccocks*, 1 Atk. 500, *post* p. *839.]

(r) *Watkins v. Cheek*, 2 S. & St. 199.

7 Paige 421; *Collier's Will*, 40 Mo. 287, 325; *Marsh v. Wheeler*, 2 Edw. Ch. 163; *Fuller v. Winthrop*, 3 Allen 51; *Ford v. Whedbee*, 1 Dev. & Bat. Eq. 16, 20. But, *contra*, if for the donee's benefit, *Delavergne v. Dean*, 45 How. Pr. 206. And where land is devised to A on his

paying a legacy in installments to B, the legacy vested notwithstanding the death of B before the time of payment, *Bowker v. Bowker*, 9 Cush. 519; *Traver v. Schell*, 20 N. Y. 89; *Maxwell v. McClintock*, 10 Penna. St. 237; *Stone v. Massey*, 2 Yea. 363.

intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete.

And here it may be observed, that it is a circumstance always in favor of the immediate vesting, that the testator has expressly given over the legacy to another in the event of the legatee dying under certain circumstances; the inference being, in such case, that the legacy is meant to be raised out of the land for the benefit of the original legatee, in every event, except that on which it was expressly given to the substituted legatee. (s)

On the same principle, where a testator provides that, in the event of his legatee, or one of the legatees, if more than one, dying in his own lifetime, the legacies should not sink into the land, but be raised for the benefit of some other persons,—a *strong argument is naturally suggested, that the testator must intend the legacies to be raised for the benefit of the legatee absolutely, or, in other words, that he should take a vested interest in case he does survive the testator. (t)

[And, on the other hand, although the time of payment may appear to be fixed with a view to the convenience of the estate, for instance, six months after the death of an annuitant, yet, if the direction be to pay at that time to the legatees, “or such of them as shall be then living,” it is clear that the representatives of one who dies before the annuitant cannot claim a share in the fund. (u) And a gift thus, “I bequeath from and after the death of” an annuitant (annexing the

Murkin v. Phillipson.—(s) *Murkin v. Phillipson*, 3 My. & K., 257, where A bequeathed to his six grandchildren the sum of £50 each, when the youngest should come of age, they to receive the interest in the meantime, when a certain estate should be sold, adding, “if either of those children should not live to come of age, nor have an heir born in wedlock, the said £50 to be equally divided among the surviving children.” One of the grandchildren attained twenty-one, married, and afterwards died, during the minority of the youngest grandchild, leaving a child. Sir J. Leach, M. R., thought that though there was, in terms, no gift until the youngest grandchild at-

tained twenty-one, yet as interest was given in the meantime, and payment was postponed for the convenience of the estate, the interests were vested; and his Honor assented to the argument (which had been strongly urged at the bar), that as the ulterior gift showed that the legacy was intended not to sink into the land, if the legatee died under age, leaving a child, *a fortiori* it could not be meant that the legacy should sink into the land in the event of the legatee attaining twenty-one, and afterwards dying, leaving a child.

(t) *Lowther v. Condon*, 2 Atk. 127, 130.

[(u) *Goodman v. Drury*, 21 L. J., Ch. 680; see *Bruce v. Charlton*, 13 Sim. 65.

time to the gift itself,) is not a present gift with postponed payment, but a postponed gift.] (v)

Sometimes a difficulty occurs in determining at what period a sum of money charged on land is to be raised, from the absence of expressions fixing the time of payment. The cases on this subject are not all reconcilable, (x) but it seems that, generally, in such a case, the devisee would be entitled to have the money raised immediately. In *Cowper v. Scott*, (y) £1500 was to be raised, *within* six years after the testator's decease, out of the rents and profits, and interest at £4 per cent. in the meantime, for his two youngest daughters, one of whom dying under age, and within the six years, it was held to belong to her representative, on the ground that there was no precise appointment when it should be paid; the six years being mentioned as the ultimate time, and it was to be paid as much sooner as it could. But, if the testator have only a reversion in the lands charged, it is probable that the money would be held not to be raisable until the reversion fell into possession. This principle has prevailed in several cases in regard to annuities. (z)

When payable, no time of payment being fixed.

Charges on reversions.

VI.—We now proceed to consider the rules which regulate the vesting of personal legacies, (a) the payment of which is post*poned to a period subsequent to the decease of the testator. A leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only the legacy vests *instanter*. Thus, where a sum of money is bequeathed to a person at the age of twenty-one years, (b)

Vesting of personal legacies.

Distinction where time is annexed to substance of gift, and where to time of payment only.

(v) In *re Cartledge*, 29 Beav. 583.]

(x) See Cox's note to *Duke of Chandos v. Talbot*, 2 P. W. 612; but it is observable, that the cases there cited as decided on the principle that portions "do not vest, if the children die before they want them," arose in reference to portions under settlements, where the effect of holding the portions to vest *instanter* would have been to give them to the father, in the event of the children dying at a very early age, contrary to the obvious spirit and design of such provisions. [And see Butler's note IV. to *Fearne C. R.* 557.]

(y) 3 P. W. 119; see also *Wilson v. Spencer*, 3 P. W. 172; [*Emes v. Hancock*, 2 Atk. 507; *Hodgson v. Rawson*, 1 Ves. 44.] *Norfolk v. Gifford*, 2 Vern. 208, [as explained in Raithby's note, went on a different ground.]

(z) *Ager v. Pool*, *Dyer* 371 b; *Turner v. Probyn*, 1 Anstr. 66.

[(a) Including bequests of money to arise by sale of land, In *re Hart's Trusts*, 3 De G. & J. 195.]

(b) *Onslow v. South*, 1 Eq. Cas. Ab. 295, pl. 6; *Cruse v. Barley*, 3 P. W. 20; [In *re Wrangham's Trust*, 1 Dr. & Sm. 358.]

or at the expiration of a definite period (say ten years) from the decease of the testator, (c) the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative. (d) As, in *Sidney v. Vaughan*, (e) where a testatrix bequeathed to A £100, to be paid to him within six months after he should have served his apprenticeship to which he was then bound. A did not serve out his apprenticeship, but ran away from his master, and, after the expiration of the term, died intestate. It was held in D. P. that A's administratrix was entitled to the legacy, with interest from the expiration of six months. 16

So, in *Chaffers v. Abell*, (f) where a testator bequeathed certain sums of stock to trustees, to pay £40 per annum to his daughter M. for life, and, after her decease, "to pay, assign and transfer the sum of £1000 stock equally amongst all and every the child and children of M., share and share alike, *to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years*;" (g) and directed that, after the decease of his daughter, the dividends should be applied for the maintenance of the children. At the death of *the testator, M. had four children, one of whom died before the youngest attained twenty-one. The youngest alone survived M. Sir L. Shadwell, V. C., held that the four children took vested

(c) *Smell v. Dee*, 2 Salk. 415; [see also *Bruce v. Charlton*, 13 Sim. 65. Compare *Bromley v. Wright*, 7 Hare 339, *post* p. *841.]

(d) *Cloberry v. Lampen*, 2 Ch. Cas. 155, 2 Freem. 24; *Stapleton v. Chéales*, 2 Vern. 673, Pre. Ch. 317; *Harvey v. Harvey*, 2 P. W. 21; *Jackson v. Jackson*, 1 Ves. 217.

[(e) 2 B. P. C. Toml. 254.] It seems that if no interest were made payable on the legacy, the representative must wait until the legatee, if living, would have attained his majority; but if it carried interest, he would be entitled immediately. See *Crickett v. Dolby*, 3 Ves. 13; *Feltham v. Feltham*, 2 P. W. 271.

16. See *ante* note 2, p. 407; *Kelso v. Cuming*, 1 Redf. 392.

(f) 3 Jur. 577; [See also *Wadley v. North*, 3 Ves. 364; *Williams v. Clarke*, 4 De G. & S. 472; *Edmunds v. Waugh*, 4 Drew. 275; *Brocklebank v. Johnson*, 20 Beav. 205; whence it appears that the court is always anxious to find a gift independent of the direction to pay, or a direction to set apart a fund for payment of the legacy. But see *Shum v. Hobbs*, 3 Drew. 93.

(g) This is said to mean "when the youngest child that lives to the age of twenty-one attains that age." *Ford v. Rawlins*, 1 S. & St. 328; *Evans v. Pilkington*, 10 Sim. 412; see *Castle v. Eate*, 7 Beav. 296.]

interests in the stock. There was, he observed, in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, "*when and so soon as the youngest of such children should attain his or her age of twenty-one years.*"

Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are engrafted on a gift, which would, without these super-added expressions, confer an immediate interest, they do not postpone the vesting. Thus, a bequest to A and B of £3000, Navy £5 per cents., and all dividends and proceeds arising therefrom, to be equally divided between them, when they should arrive at twenty-four years of age, has been held to vest the stock immediately in the legatees. (*h*)¹⁷

Superadded words of division or distribution.

[The same rule prevails where payment is in terms postponed until the testator's debts are satisfied, (*i*) or his assets realized, (*k*) or an outstanding security is got in, (*l*) or until certain real estate is sold, (*m*) or money directed by the will to be laid out in the purchase of land is so laid out. (*n*) And an immediate gift to several is not made contingent by a superadded direction for distribution between them equally as three barristers should think fit, the discretion not extending to authorize any alteration in the extent of the interests given to the legatees. (*o*)

It is of course immaterial whether the gift precedes or follows the direction to pay. Therefore, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter, as and when they should respectively attain the age of twenty-one, share and share alike, "to whom I give and bequeath the *same accordingly,"

Immaterial that the words of division precede those of gift.

(*h*) May v. Wood, 3 B. C. C. 471.

17. See note 2, *supra*, p. 407.

[(*i*) Small v. Wing, 5 B. P. C. Toml. 66.

(*k*) Gaskell v. Harman, 6 Ves. 159, 11 Ves. 489. The position in the text seems to be warranted by Lord Eldon's observations in this case. The case itself was an extremely special one.

(*l*) Wood v. Penoyre, 13 Ves. 325 a.

(*m*) Stuart v. Bruere, 6 Ves. 529, n.;

and see Tily v. Smith, 1 Coll. 434.

(*n*) Sitwell v. Bernard, 6 Ves. 522; see also Hutcheon v. Mannington, 4 B. C. C. 491, n., 1 Ves., Jr., 365; Entwistle v. Markland, 6 Ves. 528, n.; Whiting v. Force, 2 Beav. 571; Lucas v. Carline, Id. 367; In re Dodgson's Trust, 1 Drew. 440.

(*o*) Kavanagh v. Morland, cited by Wood, V. C., in Maddison v. Chapman, 4 K. & J. 715.

Lord Cottenham held the legacy vested in the children on their birth. (*p*)

But if it is clear from the language of the will that the attainment of a certain age is made a condition precedent to the vesting of a legacy, such legacy will be contingent notwithstanding a gift of the legacy distinct from the direction to pay; so that a gift to A, to be paid *in case* he attained the age of twenty-one *and not otherwise*, is contingent upon A's attaining that age. (*q*) So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid, (*r*) or until a sale directed thereby should be completed, (*s*) or until assets in a foreign country should be actually remitted to the legatee, (*t*) the intention was carried into execution, and the vesting as well as payment was held to be postponed. (*u*)

And in all cases where] the payment or distribution is deferred not merely (as in the cases noticed above) until the lapse of a definite interval of time, which will [or ought to] certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. This distinction was recognized in *Atkins v. Hiccocks*, (*x*) where a sum of £200 was bequeathed to A, to be paid at her marriage, or three months afterwards, provided she married with consent; and Lord Hardwicke held

(*p*) In *re Bartholomew*, 1 Mac. & G. 354; and see *Livesey v. Livesey*, 3 Russ. 287, 542; *King v. Isaacson*, 1 Sm. & G. 371.

(*q*) *Knight v. Cameron*, 14 Ves. 389; *Lister v. Bradley*, 1 Hare 10; *Heath v. Perry*, 3 Atk. 101. See also *Hunter v. Judd*, 4 Sim. 455.

(*r*) *Bernard v. Montague*, 1 Mer. 422.

(*s*) *Elwin v. Elwin*, 8 Ves. 546; *Faulkner v. Hollingsworth*, cit. Id. 558.

(*t*) *Law v. Thompson*, 4 Russ. 92.

(*u*) But not necessarily to the time when the debts have been *actually* paid, or the sale completed; for the court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period. See the cases cited above, and see *Small v. Wing*, 5 B. P. C. Toml. 74; *Astley v. E. of Essex*, L.

R., 6 Ch. 898. In *Birds v. Askey*, 24 Beav. 615, where there was a residuary gift, "after satisfying the trusts" of the will, to A, *if then living*,—one of the trusts being in favor of A himself for life,—and it was decided that this meant if A was living after provision had been made for the due execution of the will, the M. R. held that this was a duty which fell on the executors immediately on the testator's decease, and that the residue vested in A at that time.]

(*x*) 1 Atk. 500; [and see *Ellis v. Ellis*, 1 Sch. & Lef. 1; *Morgan v. Morgan*, 4 De G. & S. 164. Compare] *Booth v. Booth*, 4 Ves. 399, *post* § 7: [and *West v. West*, 4 Gif. 198 (legacy on marriage with consent of *guardians* was construed to require consent only to marriage under age.)]

that A having died unmarried, her representative was not entitled to the legacy.

It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

Rule where the only gift is in the direction to pay, &c.

*Thus, in a leading case, (*y*) where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, *upon his, her or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage with consent*; and the trustees were authorized to apply the rents, profits, and interests, or so much as they should think proper, for the maintenance of such brothers and sisters in the meantime. Sir W. Grant, M. R., held that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five.

So, where (*z*) a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, on the youngest attaining twenty-one years, at her and my executor's discretion; such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;" Sir J. Leach, V. C., on the principle above stated, held, that children who died [*infants*] (*a*) before the youngest attained twenty-one, took no interest.

(*y*) *Leake v. Robinson*, 2 Mer. 363; [*Meredith v. Tooke*, Hov. Sup. Ves., Jr., 324; *Murray v. Tancred*, 10 Sim. 465; *Mair v. Quilter*, 2 Y & C. C. C. 465; *Boughton v. James*, 1 Coll. 26; *Walker v. Mower*, 16 Beav. 365; *Gardiner v. Slater*, 25 Beav. 509; *Locke v. Lamb*, L. R., 4 Eq. 372. By the position in the text it is not to be understood, that the gift of a legacy under the form of a direction to pay at a future time, or upon a given event, is less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a

like event; but that a distinction is to be taken between these two cases on the one hand, and the case, mentioned above, of a gift of a legacy, with a superadded direction to pay at a future time, or upon a given event, on the other hand. Per *Wigram*, V. C., 2 Hare 17, 18. Still a direction to pay may help with other indications to show that the legacy is intended not to vest till payment, per *Jessel*, M. R., 6 Ch. D. 246.]

(*z*) *Ford v. Rawlins*, 1 S. & St. 328.

[*(a)* See *Leaming v. Sherratt*, 2 Hare 14, stated *post*.

But even though there be no other gift than in the direction to pay or distribute *in futuro*; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question.¹⁸ Thus, where a sum of stock is bequeathed to A for life; and, after his decease, to trustees, upon trust to sell (b) and pay and divide the proceeds to and between C and D, or to pay certain legacies thereout to C and D; as the payment or distribution is evidently deferred until the decease of A, for *the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator. (c) [This doctrine prevails as well in gifts to a class (d) as to individuals.

Thus, in *Blamire v. Geldart*, (e) a testator bequeathed to his nephew A £200 consols at his (the testator's) wife's decease, and made her his residuary legatee; and Sir W. Grant, M. R., held that A's legacy vested immediately on the testator's death, the wife, as residuary legatee, taking a life interest in that stock, so given to A.

So, in *Cousins v. Schroder*, (f) where a testator gave his real and personal property to his wife, for her life, and directed that, at the end of twelve months next after his death, £1000 should be invested in the names of trustees, in trust to pay the dividends to his daughter for life, and upon her decease to divide the capital amongst all the children of his daughter as they should attain the age of twenty-one; and he directed, that at the end of twelve months next after the decease of his wife, the further sum of £1000 should be laid out for the benefit of his daughter and her children upon the like trusts as the first £1000; Sir L. Shadwell, V. C., held that if the children lived to attain twenty-one they were capable of taking both sums of £1000, although they died before the time of payment.

18. See *ante* note 15, p. 450, and cases there cited.

(b) Such sale is generally intended only to facilitate the distribution, *Bromley v. Wright*, 7 Hare 225; *Day v. Day*, 1 Drew. 569; *Bayley v. Bishop*, 9 Ves. 6; *Parker v. Sowerby*, 1 Drew. 488, 17 Jur. 752; *Hodges v. Grant*, L. R., 4 Eq. 140.

(c) *Hallifax v. Wilson*, 16 Ves. 171; *Chaffers v. Abell*, 3 Jur. 578; *Watson v. Watson*, 11 Sim. 73; *Baynes v. Prevost*,

8 Jur. 506; *Packham v. Gregory*, 4 Hare 396; *In re Wilson*, 14 Jur. 263; *Salmon v. Green*, 11 Beav. 453; *Homer v. Gould*, 1 Sim. (N. S.) 541; *Marshall v. Bentley*, 1 Jur. (N. S.) 786; *Strother v. Dutton*, 1 De G. & J. 675; *In re Bright's Trust*, 21 Beav. 67; *McLachlan v. Taitt*, 28 Beav. 402. (d) *Smith v. Palmer*, 7 Hare 225.

(e) 16 Ves. 314; see also *Medlicott v. Bowes*, 1 Ves. 207.

(f) 4 Sim. 23.

Again, in *Bromley v. Wright*, (g) a testator devised his real and personal estate to trustees, in trust for his wife for life, and after her decease, in trust within or at the expiration of ten years from her decease, or from his own decease if he survived her, to sell and convert, and to invest the proceeds; the income of the fund so produced, and the rents and profits until the sale, to be held on the after-mentioned trusts. The testator then gave to A an annuity of £100, for the term of ten years after the decease of the survivor of himself and his wife, for the use of A and B, and in case of *the decease of either of them, then for the survivor; and at the expiration of the term of ten years, he gave to A, if then living, £2000, but if she should be then dead, to B, and the will contained a gift of the residue. A and B survived the testator, and both died before the expiration of the ten years; it was held by Sir J. Wigram, V. C., that the legacies of A and B were vested; observing that the words of contingency were obviously introduced with a view to provide for a case between A and B, and not between them and the estate: the postponement of the legacy was for the convenience of the estate, and was not personal to the legatees. (h)

A gift over in case of the legatee's death before the period of distribution will not generally prevent the application of this doctrine.] (i)

On the same principle, the mere introduction into an ulterior gift of new words of disposition has no effect in postponing the vesting. Thus, where a testator bequeaths personalty to trustees, in trust for A for life, adding, "and after her decease, then I give," &c., these words do not postpone the gift to the posterior legatee until the decease of A, but merely show that that is the period at which it will take effect in possession. (k) ¹⁹

So, where a legacy is given to a person if, or provided, or in case, or

(g) 7 Hare 334. But see *Beck v. Burn*, 7 Beav. 492; *Chevaux v. Aislabie*, 13 Sim. 71; *Davidson v. Procter*, 19 L. J., Ch. 395, which appear to be undistinguishable from, and inconsistent with, the other cases. *Beck v. Burn* was doubted by *Kindersley, V. C.*, in *Parker v. Sowerby*, 17 Jur. 752; and by *Romilly, M. R.*, in *Adams v. Roberts*, 25 Beav. 658; and though constantly cited, appears never to have been followed.

(h) Compare *Parr v. Parr*, 1 My. & K.

647, where, on a bequest of residue to be settled on A, so as to "devolve" in case of her death on her children, and if she should have none, then that she should bequeath it as she thought fit, it was held, that only those children who survived A were entitled.

(i) *Shrimpton v. Shrimpton*, 31 Beav. 425.]

(k) *Benyon v. Maddison*, 2 B. C. C. 75. 19. See *ante* note 6, p. 417; note 7, p.

421.

Gift seemingly
contingent
vested by gift
of intermediate
interest.

when, (for it matters not which of these words is used, (*l*) he attains the age of twenty-one years, (*m*) or marries, (*n*) though such legacy standing alone and unexplained would clearly be contingent, *i. e.*, would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the testator and the future period in question is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's Case*, (*o*) that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests for the purpose of postponing, not the vesting, but the possession only. Thus, in *Hanson v. Graham*, (*p*) where A gave to his *grandchildren B, C, and D, £500 £4 per cent. annuities apiece, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen with consent, and directed that the interest of the said bank annuities should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir W. Grant, M. R., after a full and able examination of the authorities, held, on the principle above stated, that the legacies vested at the death of the testator. 20

So, in *Lane v. Goudge*, (*q*) where A bequeathed certain £3 per cent. consols to L. for his (L.'s) second daughter, that he should have born, for her education till she should attain the age of twenty-one years; and, after she should attain to the said age of twenty-one years, the testator gave the said interest to her and her heirs forever, she being christened Z. The second daughter was christened Z, and was held to be absolutely entitled, though she died at the age of seventeen. (*r*)

(*l*) 6 Ves. 243.

(*m*) *Atkinson v. Turner*, 2 Atk. 41;
Knight v. Cameron, 14 Ves. 389.

(*n*) *Elton v. Elton*, 3 Atk. 504.

(*o*) *Ante p.* *805.

(*p*) 6 Ves. 239.

20. So *Stevenson v. Lesley*, 70 N. Y. 512; *Petersen's Appeal*, 88 Penn. St. 397; and see *Millard's Appeal*, 87 Id. 457, where the executors were directed to pay income to A and *in their discretion* the principal.

(*q*) 9 Ves. 225; see also 7 Ves. 421; [2 Freem. 24; Pre. Ch. 317; 13 Sim. 418; 1 Coll. 281; 2 Sm. & Gif. 212; 2 J.

& H. 122.]

(*r*) See also *Love v. L'Estrange*, 5 B. P. C. Toml. 59; [*Boulton v. Pilcher*, 29 Beav. 633; *Bird v. Maybury*, 33 Beav. 351; *Hardcastle v. Hardcastle*, 1 H. & M. 405; *In re Peek's Trusts*, L. R., 16 Eq. 221.] Gift of interest followed by gift of principal: *Batsford v. Kebbell*.—Compare these cases with *Batsford v. Kebbell*, 3 Ves. 363, where A bequeathed to E. the dividends, which should become due after her death, upon £500 £3 per cents., until he should arrive at the full age of thirty-two years, at

[So, where (s) a testator bequeathed to each of his daughters £1800 to be paid upon their respective days of marriage, subject to certain conditions in the will mentioned, together with interest from the time of his decease; Lord Clare, C. Ir., held that the legacies were vested. And, in *Vize v. Stoney*, (t) Sir E. Sugden, *C. Ir., so decided the same point,—“A legacy,” he said, “cannot be more or less contingent: the law recognizes nothing between a contingent and a vested legacy.” Therefore, whatever the nature of the event, a gift of the intermediate interest has always the same effect.]

A gift of interest, *eo nomine*, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a ^{Gift of the whole interest favors vesting.} premium or compensation for the forbearance of principal, to which it supposes a title; and it makes no difference that it is directed to be applied for maintenance. (u) But a mere allowance for

which time she directed her executors to transfer to him the principal sum for his own use. Lord Loughborough held, that the legacy failed by the death of E. under thirty-two; observing, that the testatrix had drawn a clear distinction between the dividends and the capital. See also [*Billingsley v. Wills*, 3 Atk. 219;] *Sansbury v. Read*, 12 Ves. 75; *Ford v. Rawlins*, 1 S. & St. 328, *ante* p. *840. These cases have been commonly considered as decided on the principle, that, where the interest or dividends alone are the subject of bequest until a particular time, and the principal is then, *for the first time*, to be taken out of it, the intermediate gift of the interest or dividends will not vest the capital: 1 *Rop. Leg.*, p. 581, *White's ed.*; [*Spencer v. Wilson*, L. R., 16 Eq. 501.] It must not too readily be assumed, however, that any given case falls within the principle, as the courts have evinced no great inclination to extend it; and, in truth, in some of the cases of this class, the difference of expression was very slight. [And in *Westwood v. Southey*, 2 Sim. (N. S.) 192, *Kindersley, V. C.*, denied the existence of any such principle. It was suggested by *Arden, M. R.*, 3 Ves. 367, that *Batsford v. Kebbell* was to be referred to the cir-

cumstance that the gift of principal was postponed to a more advanced age than that at which the law would put the legatee in possession. Such a postponement is of course ineffectual after twenty-one, if the legacy is vested. But this distinction has not been recognized. *Wood, V. C.*, lays it down as clear, that a gift of income until twenty-five, with a gift of principal at that age, vests at once, L. R., 3 Eq. 320.

(s) *Keily v. Monck*, 3 Ridg. P. C. 205.

(t) 2 D. & Wal. 659, 1 D. & War. 337.]

(u) *Fonnereau v. Fonnereau*, 3 Atk. 645; *Hoath v. Hoath*, 2 B. C. C. 3. See also 1 *Russ.* 220; 1 *Taml.* 18; [1 *Hare* 10; 3 *De G. & J.* 195; 3 *K. & J.* 503; 1 *H. & M.* 411; 29 *Beav.* 604; 31 *Beav.* 425; L. R., 19 Eq. 286. *Taylor v. Bacon*, 8 Sim. 100, and *In re Ashmore's Trusts*, L. R., 9 Eq. 99, are *contra*. In the latter case, *James, V. C.*, relied on *Pulsford v. Hunter*, 3 B. C. C. 416, which has generally (see 2 *Mer.* 386) been considered an authority only for the position for which it is cited below, n. (x). The report is obscure; but it is very improbable that Lord Thurlow (whose decision it is, but of which there seems to be no entry in *R. L.*.) intended to overrule his own previous decision in *Hoath v. Hoath*, 2 B. C. C. 3, where he held that “giving the

maintenance out of, and of less amount than the interest, has, it seems, no such influence on the construction. (x) [And a discretionary trust to apply for maintenance the whole of the interest, or so much as the trustees think fit, has generally been considered and held to be equally ineffectual. (y) It is still only a gift of so much as is required for maintenance; and the unapplied surplus, if any, will not belong to the legatee, but will follow the fate of the principal. (z) It would be otherwise if the trust could be construed as a gift of the whole interest, at all events: and in *Fox v. Fox*, (a) Sir G. Jessel did so construe it, and consequently held the legacy to be vested, "and not the less so because there was a discretion to apply less." But, whatever may be thought of this construction, it is inapplicable where the *surplus is directed to be accumulated and is then blended in one gift with the principal.] (b) An annual allowance for maintenance, [although equal in amount to the interest, will not, unless given as interest upon the legacy, make the legacy vested: the gifts are perfectly distinct, and the title to the annual allowance actually given could not be affected by the interest on the legacy not amounting to so large a sum. (c)

In *Davies v. Fisher*, (d) where a testatrix bequeathed her residuary

interest for maintenance was precisely the same thing" as giving the interest *simpliciter*. The previously-established rule was recognized in *Fox v. Fox*, L. R., 19 Eq. 286.]

(x) *Pulsford v. Hunter*, 3 B. C. C. 416; see *Leake v. Robinson*, 2 Mer. 387.

(y) *Leake v. Robinson*, 2 Mer. 363, 381, 384.

(z) See judgment of Wood, V. C., in *re Sanderson's Trusts*, 3 K. & J. 507, 508, 509.

(a) L. R., 19 Eq. 286, relying on *Harrison v. Grimwood*, 12 Beav. 192, where, however, the trust for maintenance (during part of the interval) was only one of several combined grounds for the decision. *Eccles v. Birkett*, 4 De G. & S. 105, is open to a similar observation, having regard especially to the contrast between the clearly-contingent words "children *who*, &c.," and the more equivocal "as and when," and to the exception of two children by name—as to which last point see 1 Drew. 496; but no rea-

sons are reported. A *dictum* of Turner, V. C., in *In re Rouse's Estate*, 9 Hare 649, has also been sometimes cited to the same effect; but it proceeds on a questionable interpretation of what Lord Kenyon said in *Wynch v. Wynch*, 1 Cox 433, imputing to the latter the doctrine that a gift *out of* income for maintenance vests a legacy. The V. C.'s decision is referable to other grounds, *post* p. *848.

(b) *In re Grimshaw's Trusts*, 11 Ch. D. 406. See *Knight v. Knight*, *post* p. *847. *Secus* if the case comes within *Saunders v. Vautier*, Cr. & Ph. 240, *post*. (And see *Barker v. Barker*, W. N. 1880, p. 14, Ch. D.—AM. Eds.)

(c) *Watson v. Hayes*, 5 My. & C. 125; and see *Livesey v. Livesey*, 3 Russ. 287.

(d) 5 Beav. 201. In *Milroy v. Milroy*, 14 Sim. 48, the word "minority" was held to mean the whole interval until the youngest child attained twenty-five. See *Maddison v. Chapman*, 4 K. & J. 709, 3 De G. & J. 536; *Lloyd v. Lloyd*, stated next page.

personal estate in trust for A for life, and after his death in trust for his children, as they severally attained the age of twenty-five years, the income to be applied *by their guardians* during their respective *minorities* for their maintenance; Lord Langdale, M. R., thought that although there was no distinct gift of the interest yet that such a gift was to be implied from the direction to apply it during minorities. "The inference or implication," he said, "arises from the direction to apply the interest; and, although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or implication in like manner, or to the mere time to which the direction applies. At that time the mode of enjoyment expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment." He therefore held that on this ground alone the children would have taken vested interests. But the case did not rest entirely on this ground; (e) and even if it did, it would not be an authority that a gift of interest arising during a part only of the interval before the time of payment vests the legacy. There are *dicta* opposed to such a doctrine; (f) and in the case itself a gift of interest during the whole interval was (as will have been seen) supplied by implication, (g) a construction which might often be found convenient to fill up a gap in such cases.

Gift of interest for the whole of the intermediate time implied from direction how to apply it during part of the time.

A gift of the interest operates as well where the legacy is to a class, as where it is to an individual, (h) provided that each member of the class has a distinct title to the interest of his own *share. But where the interest is given as a common fund for the maintenance of all the members of the class, until all have attained the prescribed age, it does not vest the legacy. Thus in *Lloyd v. Lloyd*, (i) the testator devised lands to trustees upon trust for his daughter for her life, and after her death upon trust to apply the rents "for and towards the maintenance, education and

Gift of interest operates on legacy to a class.

(e) See S. C., *post* § 7.

(f) Per Wood, V. C., L. R., 3 Eq. 321; per Romilly, M. R., 31 Beav. 302.

(g) In *Tatham v. Vernon*, 29 Beav. 604, this was so expressed, viz., a gift to children at twenty-five, with gift of interest "in the meantime," for their maintenance "during minority."

(h) See references, p. *844, n. (u).

(i) 3 K. & J. 20; and see *Vorley v.*

Richardson, 8 D., M. & G. 126, 129, 130; *In re Hunter's Trusts*, L. R., 3 Eq. 298; *Davenhill v. Davenhill*, 5 W. R. 18; *Bickford v. Chalker*, 2 Drew. 327; and per Sir J. Romilly, *Sanders v. Miller*, 25 Beav. 156. *A fortiori* if the trustees have power to exclude some of the class from all maintenance, *In re Barnshaw's Trust*, 15 W. R. 378.

benefit of all and every the child and children of his said daughter during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell the lands, and pay the money arising therefrom to and amongst all and every such child or children, share and share alike, if more than one, and if but one then the whole to such only child." Sir W. P. Wood, V. C., treated it as settled that a gift in that form, without the gift of income, vested only in such as attained twenty-one. (j) Then, did the gift of income vest it sooner? He thought not. The V. C. appears to have read the words "during their minority," as meaning while any child was under age, so that a child having attained twenty-one still continued entitled to a share of income; and he thought it was plain the testator never intended that on a child dying under twenty-one, its representatives should receive its share of income until all attained twenty-one, and that this view took it out of the rule in *Hanson v. Graham*, that shares were vested when all intermediate interest and profits were given to the legatees.

But although the gift of *corpus* be in this form, yet if the intermediate income be given direct to the children until the youngest attains twenty-one, no common fund is created; each child is entitled to the income of his own share of *corpus*, the gift of which is consequently vested. (k)

However, a testator is not to be denied the power of giving interest without vesting the legacy, if such be his intention. Thus, in *In re Bulley's Estate*, (l) where residue was bequeathed in trust for A for life, and after her death "to be paid to her surviving children in equal shares, as soon as they shall come to the ages of twenty-two years respectively, and not to go to their heirs or assigns or to any other person or persons on any pretence what*soever; that is to say, the share of each child which may die after the death of A and before it arrives at the age of twenty-two years shall go among the others who may arrive" at that age; "and if any of the said children shall be under twenty-two after the death of A then my will is that only the interest of the share of such child shall be paid to it or for its benefit until it arrives at the age of twenty-two;" it was held by Stuart, V. C., and on appeal by K.

Gift of interest will not vest the legacy where a contrary intention appears.

(j) See *Leeming v. Sherratt*, 1 Drew. 488, at the end of this chapter.

(k) *In re Grove's Trusts*, 3 Gif. 575.

(l) 11 Jur. (N. S.) 847.]

Bruce and Turner, L. JJ., that only those children who attained twenty-two were intended to share.]

Where (m) the principal and interest are so undistinguishably blended in the bequest that both must vest, or both be contingent, of course no argument in favor of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., as soon as they attained the age of twenty-one years, the sum of £200, with interest at the rate of £5 per cent. per annum, Sir J. Leach, V. C., held that there was no gift either of principal or interest until the daughter attained twenty-one.

Where vesting of interest as well as principal is postponed, legacy contingent.

But the construction which suspends the vesting of the interest as well as the principal, inconvenient as it evidently is, will not be adopted, unless the intention be very clear. Thus, in *Breedon v. Tugman*, (n) where a testator bequeathed one-third of his personal property to his wife; another third to his son, to be laid out in an annuity; and the other third to his daughter, adding, "and in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years;" it was contended that the words "in case of my decease," imported contingency, and which, as in *Knight v. Knight*, extended to the interest as well as the principal, and that neither of them was vested until the age of twenty-five; but Sir J. Leach, M. R., said that this was plainly an absolute gift to the daughter, and that the payment only was postponed; the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish between the time when she was to receive the interest, and the time when she was to receive the principal.

So a direction subjoined to a simple bequest of stock, that the "interest" shall be added to the "principal" [or accumu*lated] till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities (which term it was contended, pointed to the interest on the legacies) might fall in. (o)

(m) *Knight v. Knight*, 2 S. & St. 490; [In re Thruston, 17 Sim. 21; *Chance v. Chance*, 16 Beav. 572; *Morgan v. Morgan*, 4 De G. & S. 164. *Butcher v. Leach*, 5 Beav. 392, is, perhaps, referable to this principle: *sed qu.*]

of a residue, and therefore may seem to belong to the next section; but as the ground of decision seemed to connect it with *Knight v. Knight*, it has been stated here.

(o) *Stretch v. Watkins*, 1 Mad. 253.

(n) 3 My. & K. 289. This is the case [See also *Blease v. Burgh*, 2 Beav. 226;

Again, a legacy to be severed from the general estate *instantly*, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. Therefore, in *Saunders v. Vautier*, (*p*) where a testator bequeathed his E. I. stock to trustees upon trust to accumulate the dividends until A should attain his age of twenty-five years, and then to transfer the principal with the accumulated dividend to A, his executors, administrators and assigns, absolutely; it was contended on the authority of *Knight v. Knight*, that the legacy was contingent on A attaining the specified age; but Lord Cottenham, on the principle stated above, held it vested, and decreed payment to A when he was twenty-one years of age.

It has also been held that a bequest to a person, if or when he attains a particular age, will be vested if the whole intermediate interest, though not given to the legatee himself, is expressly disposed of in the meantime for the immediate benefit or furtherance of some other person or object. It is only an exception out of the whole property meant to vest in the legatee, whose interest is, therefore, in the nature of a remainder which vests immediately, and its actual enjoyment only is postponed. This is in conformity with the principle of *Boraston's Case*, (*q*) which, according to Sir W. Grant, M. R., (*r*) there was no ground to say ought to have been differently decided if it had occurred as to a pecuniary legacy.

Thus, in *Lane v. Goudge*, (*s*) where one of the bequests was to L. till his (L.'s) second daughter should attain the age of twenty-one years, and after she should attain that age to her absolutely; the same judge held that, supposing the gift to L. was for his *own and not for

Josselyn v. Josselyn, 9 Sim. 63; *Bull v. Johns*, Tambl. 513; *Oppenheim v. Henry*, 10 Hare 441.

(*p*) Cr. & Ph. 240. See also *Greet v. Greet*, 5 Beav. 123; *Lister v. Bradley*, 1 Hare 10; *Love v. L'Estrange*, 5 B. P. C. Toml. 59, cit. 6 Ves. 248; *Thruston v. Anstey*, 27 Beav. 335; *Oddie v. Brown*, 4 De G. & J. 185, 194; *In re Rouse's Estate*, 9 Hare 649; *Dundas v. Wolfe-Murray*, 1 H. & M. 425. So, although in one event the legacy is expressly given back

to residue, *Pearson v. Dolman*, L. R., 3 Eq. 315. But compare *Festing v. Allen*, 5 Hare 577, and *Gotch v. Foster*, L. R., 5 Eq. 311, suggesting the limits of the doctrine.

(*q*) 3 Co. 16, *ante* p. *805.

(*r*) 6 Ves. 247. In *Laxton v. Eedle*, 19 Beav. 323, there is a contrary *dictum* of the M. R., which, however, appears unnecessary to the decision of that case.

(*s*) 9 Ves. 225.

his daughter's benefit (and there was nothing but conjecture for a contrary supposition,) yet that the daughter took a vested interest.

If the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word "vest" is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded; for a legacy cannot vest at two different periods. (t)

Effect of an express direction when the legacy is to "vest."

But a question generally arises in these cases as to the real meaning to be attributed to the word. If the testator has in other parts of the will treated the fund bequeathed as belonging to the legatee and spoken of his *share* therein before the specified period, (u) or if he has given over the fund in case the legatee dies before the time named without issue, from which it is to be inferred that the legatee is to retain it in every other case, (x) the natural conclusion is, that the word is to be read as meaning "payable" or "inde-feasible," and that the gift is vested, liable only to be divested on a particular contingency. A gift over before the time named, or before attaining "a vested interest," *simpliciter*, although indecisive perhaps by itself, (y) tends strongly to the same conclusion. (z) The possibility of the legatee so dying, and of his leaving issue, who, if the legacy is strictly contingent and does not devolve to them from their parent, are otherwise altogether (a) or in some probable event (b) unprovided for by the will, has in these, as in many other cases, furnished a powerful motive for adopting a more liberal interpretation. Where, upon the parent so dying, the legacy is expressly given to his issue, this motive is wanting, and the court will be slow to

In what cases "vested" means "inde-feasible."

In what cases literally construed.

[(t) *Glanvill v. Glanvill*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 246; *Wakefield v. Dyott*, 4 Jur. (N. S.) 1098.

(u) *Berkeley v. Swinburne*, 16 Sim. 275 (residue); *Poole v. Bott*, 11 Hare 33 (real estate); *Walker v. Simpson*, 1 K. & J. 713; *Barnet v. Barnet*, 29 Beav. 239; *Armtyage v. Wilkinson*, 3 App. Cas. 355 ("absolute vesting.")

(x) *Taylor v. Frobisher*, 5 De G. & S. 191. Lord Hardwicke seems to have used the word in this sense in *Haughton v. Harrison*, 2 Atk. 330.

(y) *Glanvill v. Glanvill*, 2 Mer. 38; *In re Blakemore's Settlement*, 20 Beav. 214; *In re Morse's Settlement*, 21 Beav. 174.

The last two cases were upon deeds, and moreover proceeded upon the questionable distinction drawn by Leach, M. R., 3 My. & K. 411, between a gift over under age, and a gift over under age and without issue. See *post* p. *857, n. (g).

(z) *In re Baxter's Trusts*, 10 Jur. (N. S.) 845. Cf. *Pickford v. Brown*, 2 K. & J. 426, where the gift over itself contained expressions favoring the suspension of vesting, as in *Russel v. Buchanan*, *ante* p. *813.

(a) *Taylor v. Frobisher*, 5 De G. & S. 191.

(b) *In re Edmondson's Estate*, L. R., 5 Eq. 389.

depart from the primary meaning of the word "vest," and of associated expressions the natural import of which is contin*gency. (c) So, if the will gives the issue the chance of taking through their parent, as if the legacy is directed to vest in the legatee on his attaining a specified age, or dying leaving issue. (d) A gift of the interest until the arrival of the time named also favors the less strict construction upon principles already explained. (e) But if the interest is to be accumulated and paid at the same time as the principal fund; (f) or if by the context a distinction is drawn between the terms "vested" and "payable," (g) the word "vest" must have its proper meaning. 21

Where the bequest is in the first instance to a restricted class, as to children *who* shall survive A, a direction that the legacy shall vest, say, at the age of twenty-one, will not generally enlarge the class, but only impose a further condition of enjoyment on the class already defined. (h) But where the direction was that the legacy should vest in "the children," thus giving a new description without the previous restriction, the restriction was held to be neutralized. (i) So, where the bequest was to such of the children as should attain twenty-five, and it was declared that if any child attained twenty-one and died before

(c) *Rowland v. Tawney*, 26 Beav. 67; held to be used indiscriminately, *In re Baxter's Trusts*, 10 Jur. (N. S.) 845.
 and see *Comport v. Austen*, 12 Sim. 246;
Selby v. Whittaker, 6 Ch. D. 249.

(d) *In re Thatcher's Trusts*, 26 Beav. 365. See further on the meaning of "vested" in gifts over in case of the legatee dying before attaining a "vested" interest, ch. XLIX.]

(e) *Simpson v. Peach*, L. R., 16 Eq. 208 ("payable" and "vested" exchanged meanings.)

(f) *In re Thruston*, 17 Sim. 21; see also *Griffith v. Blunt*, 4 Beav. 248.

(g) *Ellis v. Maxwell*, 12 Beav. 104; see also *Parkin v. Hodgkinson*, 15 Sim. 293; *In re Thatcher's Trusts*, 26 Beav. 365; *In re Colley's Trusts*, L. R., 1 Eq. 496, where the strict construction was assumed.

In Sillick v. Booth, 1 Y. & C. C. C. 121, and *King v. Cullen*, 2 De G. & S. 252, the context gave to the word "vested" in a gift over upon death before vesting a sense corresponding to the word "payable" used in the primary gift. "Paid" was held to mean "vested" in *Martineau v. Rogers*, 8 D., M. & G. 328. And sometimes where both words occur, they are

21. A provision that shares "shall vest" as the donees come of age is construed to mean *take effect in possession*, *Thompson v. Thompson*, 28 Barb. 432; *Johnson v. Valentine*, 4 Sandf. 36. But not so a gift of slaves "to be laid off, allotted and vested on the division and partition of my estate," *Jones v. Massey*, 9 S. C. 376.

[(h) *In re Payne*, 25 Beav. 556; *In re Parr's Trusts*, 41 L. J., Ch. 170; *Bickford v. Chalker*, 2 Drew. 327; *Williams v. Haythorne*, L. R., 6 Ch. 782 (though it was residue and another clause became surplusage.)

(i) *Jackson v. Dover*, 2 H. & M. 209 (residue.)

twenty-five his share should vest at his death, the shares were held to vest at twenty-one.](k)

VII.—It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or, at least (and this is the material consideration,) such *may be* its effect; for, in construing wills, we must look indifferently at actual and possible events.

Vesting of residuary bequests.

Possible as well as actual events to be regarded.

Among the numerous cases which may be cited as illustrative *of the leaning of the courts towards the vesting of residuary bequests, is *Booth v. Booth*, (m) where A bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces B and C, until their respective marriages, and from and after their respective marriages, to transfer their respective moieties. Sir R. P. Arden, M. R., held that B acquired a vested interest, although she died without having been married; his Honor relying much on the circumstance that it was the bequest of a residue.

(k) *Mappin v. Mappin*, W. N. 1877, p. 207 (residue.)]

(m) 4 Ves. 399. [See also *West v. West*, 4 Gif. 198; and] compare *Atkins v. Hiccocks*, ante p. *839; observing that there the bequest was pecuniary, and there was no gift of the interest in the meantime, [nor any gift over.] The disinclination so to construe a will as to make a testator die partially intestate, was also admitted in *Lett v. Randall*, 10 Sim. 112, where, however, the V. C. considered himself forced into this undesirable conclusion by the ambiguity of the will; the testator having, in a certain event, made a bequest of the share of a deceased daughter to children *then* living in such a manner as to leave it doubtful whether he referred to the period of his own death, the death of his wife, or the happening of the contingency. [And see per Romilly, M. R., 33 Beav. 396, which may be set against 14 Beav. 461.]

Word “then,” to what period it refers.—Here it may be noticed, that where (as often occurs) life interests are

bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word “then” is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life,) and is not considered as referring to the period of the determination of the several prior interests; *Archer v. Jegon*, 8 Sim. 448; [*Wollaston’s Settlement*, 27 Beav. 642; and the construction is the same though the person last named die in the testator’s lifetime, *Olney v. Bates*, 3 Drew. 319; and see *Hetherington v. Oakman*, 2 Y. & C. C. C. 299; *Harvey v. Harvey*, 3 Jur. 949; *Cain v. Teare*, 7 Id. 567; *Widdicombe v. Muller*, 1 Drew. 443; *Cormack v. Copous*, 17 Beav. 397; *Gill v. Barrett*, 29 Beav. 372. Compare *Gaskell v. Holmes*, 3 Hare 438; *Coulthurst v. Carter*, 15 Beav. 421; In re *Edgington’s Trusts*, 3 Drew. 202; In re *Deighton’s Settled Estates*, 2 Ch. D. 783, (where, if “then” had been referred to the last antecedent, a life estate just before given to the widow

So, in *Jones v. Mackilwain*, (*n*) where a testator gave to trustees all his real and personal estate, upon trust for sale, and as to one moiety of the produce for the benefit of his daughter A during her life, and after her decease, upon trust to pay to her husband B an annuity of £100 during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A, until they should severally attain his and their ages or age of twenty-one years, and as to all the said principal moneys or produce of the testator's said real and personal estate *as and when they and each and every of them should attain his, her, and their respective *age or ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A had two sons, both of whom died under twenty-one, and Lord Gifford, M. R., held that they respectively acquired vested interests; adverting to the fact of its being a residuary bequest, and that the yearly income was given to the children until the prescribed age.

It seems that where the testator first gives the residue in terms which would, beyond all question, confer a vested interest, the addition of equivocal expressions of a contrary tendency will not suspend the vesting. Thus, where (*o*) A by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies,) and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share, *and such portion not to be otherwise claimed or inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single—Sir R. P. Arden, M. R., held that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatees should not have the command of the principal till the age of twenty-two; and he laid some stress on the fact of the interest being given for maintenance.

would have been defeated.) In *Heasman v. Pearce*, L. R., 7 Ch. 275, the words "then living" occurred in two distinct gifts to children of A, one of an original share, the other of an accruing share, and followed in the one case the mention of one event, in the other the mention of another event; but the same class of children were held by James, L. J., en-

titled to both gifts on the ground that "it would be unreasonable to give the words a different meaning" in the two clauses.]

(*n*) 1 Russ. 220.

(*o*) *Dodson v. Hay*, 3 B. C. C. 404-409. See also *Stretch v. Watkins*, 1 Mad. 253; [*Brocklebank v. Johnson*, 20 Beav. 205; but see *Shum v. Hobbs*, 3 Drew. 93.]

So, where (*p*) a testator, after disposing of his real and personal estate in strict settlement, added that none of the devisees should take or come into possession before the age of twenty-five, this was held to refer to the actual possession only, and not to postpone the vesting.

But where the terms of the original gift in favor of a class are ambiguous in regard to the period of vesting, a clear intention to suspend the vesting, manifested in carrying on the gift to the class in the event of its consisting of a single object, will be decisive of the construction; as it is hardly supposable that the testator could mean to create a difference of this nature between a plurality of objects and an individual object. Thus, where (*q*) *A gave the residue of his estate, real and personal, to trustees, as to one-third, in trust for his daughter S. for life, and after her decease for the child or children of his said daughter, if more than one, share and share alike, to be paid, assigned and transferred to them by his trustees upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part *should become the property of such only child upon his or her attaining the age of twenty-five years*, and be transmissible to his or her heirs, executors or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over. Sir L. Shadwell, V. C., held that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift, in case she should leave more than one.

But subsequent words may be explanatory where the preceding are ambiguous.

[The same argument would, without doubt, apply to a case where the ambiguity existed in the gift to the single object, the original gift in favor of the class being clearly conditional. But where no such

(*p*) *Montgomerie v. Woodley*, 5 Ves. 522. [It is not competent for a testator to defer the receipt by the legatee of a legacy absolutely vested in him beyond the age of legal majority; In re Jacob's Will, 29 Beav. 402; *Gosling v. Gosling*, Johns. 265.] (See also *Bubb v. Padwick*, W. N. 1880, p. 15, where in the chancery division a gift of residue to children who should attain the age of twenty-one, to be paid when the youngest should attain that age, with remainder over of the share of any who should die before that time, was held to be vested.—AM. EDS.)

(*q*) *Judd v. Judd*, 3 Sim. 525; [see also *Tracey v. Butcher*, 24 Beav. 438; *Knox v. Wells*, 2 H. & M. 674 (as to the children surviving their father James); *Madden v. Ikin*, 2 Dr. & Sm. 207; *Merry v. Hill*, L. R., 8 Eq. 619; per Lord Selborne, L. R., 16 Eq. 271, 272.

ambiguity exists, it is of course not allowable, by inference from the collective gift, to import a contingency into the gift to the individual. This were to add words to the will, not to explain terms already existing in it; a course not warranted by the apparent singularity of the distinction made by the testator. (r)

King v. Isaacson (s) was the converse of *Judd v. Judd*; the question being, whether a clearly vested bequest to the single object imparted its own nature to ambiguous expressions contained in the prior gift to the class, when consisting of many. The testator gave the residue of his real and personal estate to trustees, in trust, as to two-thirds of the annual proceeds, for A for life, and as to the remaining one-third, in trust for B for her life; and in trust, after the decease of A and B, or either of them, to convey, pay, assign, transfer and make over all the residue, in the shares following, *i. e.*, upon the decease of A, to convey, &c., two-thirds unto and among all and every the child or children of A as and when they should severally attain twenty-one, as tenants in common; and if there should be but one child *of A, then to such only child, and to whom he gave the same accordingly: with similar trusts of the remaining third, *mutatis mutandis*, for the children of B. Sir J. Stuart, V. C., considering the general indisposition to hold a bequest contingent, and looking to the absolute gift to an only child (which was clearly vested, (t) and to the direction to convey, which, he thought, was to be observed immediately on the decease of a tenant for life, held that the children took vested interests on the testator's death.]

The vesting is obviously postponed where the attainment to a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to *the* children *who* shall attain or to *such* children *as* shall attain the age of twenty-one years; there being in such case no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty. (u) [So, where the bequest is to the children *if* or *when* they attain the particular age.]²² So clear, indeed, is this

Attainment
of particular
age made part
of the descrip-
tion of the
objects.

(r) *Walker v. Mower*, 16 Beav. 365; 51; [*Hatfield v. Pryme*, 2 Coll. 204.]

Johnson v. Foulds, L. R., 5 Eq. 268.

(s) 1 Sm. & Gif. 371.

(t) See *In re Bartholomew*, 1 Mac. & G. 354, ante p. *839.]

(u) See *Newman v. Newman*, 10 Sim.

22. *Collier v. Slaughter*, 20 Ala. 263;

Butler v. Butler, 3 Barb. Ch. 304; *Nixon*

v. Robbins, 24 Ala. 663; *Allen v. Whitaker*,

34 Ga. 6; *Leeds v. Wakefield*, 10

Gray 514; *Gifford v. Thorn*, 1 Stockt.

point, that any difficulty can scarcely occur under a gift framed in the terms suggested, unless it is occasioned by and grows out of the context, which not unfrequently explains away and neutralizes the expressions which standing alone would clearly suspend the vesting. [But here a distinction, analogous to that which exists in devises of real estate, must be observed between the former terms of bequest noticed above and the latter, as regards the explicitness of context required to control them.] For instance, if a testator, after giving to ["the children," or to "all the children," "*if*" or "*when*" they] attain a certain age, goes on to dispose of the property in case there is no child who does attain the prescribed age, he affords a plausible ground for the argument (founded on *Edwards v. Hammond* and that class of cases,) (*x*) that the subsequent words explain the sense in which he intended the prior words to be understood, namely, that the interest of the legatees was merely liable to be divested in the event described; in other words, was to become absolute at, not to be postponed until, the prescribed age. [But a gift to "*such of the children as*," or to "*the children who*" attain the age, is a gift to a restricted class; and, to admit children who do not attain the age, the context must be one capable not only of explaining *an ambiguity regarding the interests intended for the members of the described class, but also of enlarging the class itself.]

We have an example of [the latter] species of disposition in *Bull v. Pritchard*, (*y*) where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter M. ^{Bull v. Pritchard.} for life, and after her decease to pay or transfer the same unto and among all and every the child and children of M. *who should live to attain the age of twenty-three years*, with benefit of survivorship in case of the death of any of them under the age of twenty-three years, as tenants in common; and if there should be but one such child, then to such only child; and in case there should be no such child, *or, being such, all should die under the age of twenty-three*, then over to the testator's brothers and sisters. The trustees were empowered to lay out and apply the interest of each child's respective share, or so much thereof as they might think necessary towards their maintenance, not-

702; *Clayton v. Somers*, 12 C. E. Gr. (N. 351; *Colt v. Hubbard*, 33 Conn. 281; J.) 230; *Moore v. Smith*, 9 Watts 403; *Illinois Land and Loan Co. v. Bonner*, *Jackson v. Winne*, 7 Wend. 47; *Snow v.* 75 Ill. 315.
Snow, 49 Me. 159; *Tayloe v. Gould*, 10 (*x*) *Ante* p. *810.
Barb. 388; *Watkins v. Quarles*, 23 Ark. (*y*) 1 Russ. 213.

withstanding such child's share should not be then absolutely vested. Lord Gifford, M. R., was of opinion that those children alone who attained the age of twenty-three were to take, and therefore the gift was void for remoteness; observing, that the attainment of the age of twenty-three years was made a condition precedent to the vesting of any interest in the children, [and distinguishing the case from those where the gift was to children when or if they attained a certain age.]

The propriety of this determination has been questioned; (z) and perhaps looking at the gift over in connection with the direction to apply the interest of the children's *shares* for their maintenance until they became *absolutely* vested, there was ground to contend that the children took immediately subject to be divested on their respectively dying under the prescribed age. [But the case is to be referred to the distinction noted by the M. R. in his judgment.] (a)

Another case in which the vesting was held to be postponed, notwithstanding some expressions in the context apparently favorable to the immediate vesting is *Vawdry v. Geddes*, (b) where A gave the residue of her estate and effects equally between her four sisters, and directed that, on the death of her *sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, *and, upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal*, and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto. There was also a bequest in favor of the other children of the testator's sisters, in case of the death of any under twenty-two, without issue, or, being such, they should die before the principal of their respective shares should become payable. Sir J. Leach, M. R., held that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. He thought

(z) 3 M. & K. 417.

[(a) The author does not refer, and appears to have attached little value to this distinction; which, however, has since been fully recognized. He goes on (1st ed., p. 772,) to suggest that the case cannot be treated as an adjudication as to the

period of vesting, *sed qu.*: for the decree declared the next of kin entitled; whereas M. was living, and might have had children, who, if the gift was vested and consequently not remote, would have been entitled.]

(b) 1 R. & My. 203.

that the case was governed by *Leake v. Robinson*; (d) and that, even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested. He observed, that where *interim* interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period. ²³

But did not the gift over, to which his Honor here refers, suggest a strong argument for the immediate vesting? Where a testator directs that, on a given event, the "shares" of persons before named shall go in a certain manner, there seems ground to infer that, in the alternative event, the property is to be retained by the legatees; *a fortiori*, where there are cross executory gifts disposing of the "shares" of dying objects in an event in which, if the vesting be postponed, they would have no shares for the clause to operate upon. The construction adopted in the case just stated rendered the terms of the clause of substitution (for such it clearly was) inaccurate throughout. (e)

*More weight, in favor of the immediate vesting, seems to have been ascribed to the argument derived from the gift over, in *Bland v. Williams*, (f) where the testator bequeathed the residue of his estate and effects to trustees, upon trust to receive the annual income thereof, and thereout pay unto his daughter an annuity, and, after her decease, upon

Remarks on
Vawdry v.
Geddes.

Bland v.
Williams.

Vesting immediate by explanatory effect of gift over.

(d) *Ante* pp. *265, *840.

23. See *Boone v. Dykes*, 3 Mon. 530; *Emerson v. Cutler*, 14 Pick. 108; *Olney v. Hull*, 21 Pick. 311; *Matter of Ryder*, 11 Paige 185; *Adams v. Beekman*, 1 Paige 631; *Newell v. Nichols*, 75 N. Y. 78.

(e) See also *Mackell v. Winter*, 3 Ves. 236, and *Barker v. Lea*, T. & R. 413, in both which residuary bequests to children, on their attaining a particular age, were held to be contingent in the interim, though, in each case, there was a bequest over in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer

to the time of payment rather than to the gift itself; [while in the latter there was a gift of the whole income for the maintenance of the legatees.] In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible; and one cannot help suspecting that the judgment of the court was somewhat biased by the actual event, which rendered the adopted construction convenient. If intestacy had happened to be produced by the postponement of the vesting in each instance, the adjudication probably would have been different.

(f) 3 My. & K. 411.

trust to apply the income, or a sufficient part thereof, for the maintenance of the children of his daughter until they should severally attain their ages of twenty-four years; and when and as they should respectively attain that age, then upon trust to pay, transfer, and convey all the said residue of his estate, with the interest, dividends, and proceeds thereof, as should not have been applied for their maintenance, equally unto and amongst all her said children, *when and as they should severally and respectively attain their said age of twenty-four years*; and in case any or either of her said children should happen to die before having attained that age, and without leaving lawful issue of his or her body, then in trust to pay, assign, transfer, and convey all the said residue of his estate unto *such of her said children as should live to attain his, her, or their respective ages of twenty-four years*, share and share alike, if more than one, and if but one, then the whole to that one child; but in case all and every of *her said children should happen to die under that age, and without leaving lawful issue*, as aforesaid, then upon trust to pay the annual income thereof unto certain persons. It was contended, that, under the trusts in favor of the daughter's children, the vesting was postponed until the age of twenty-four, and, consequently, the gift was too remote. Sir J. Leach, M. R., however, held that the legatees acquired immediate vested interests:—"Whether, in a gift of this nature," he said, "the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. (g) In this *case, the gift over is not simply upon the death

Remark on bequest over.—(g) Why not? A gift over to take effect simply on the event alternative to that on which the prior gift was apparently made to vest, *may* surely have the effect (if such be the intention collected from the whole will) of explaining that the original gift was to be divested in favor of the ulterior substituted legatee on the happening of the prescribed event. This, we may venture to affirm, would, with very little aid from the context, be generally the construction. No such distinction as the M. R. suggests is discoverable in the cases cited *ante* (p. *810,) in which, under a devise to A, if he shall attain the age of twenty-

one years, with a devise over, in case he shall die under that age, the devise over is (we have seen) held to denote that the prior words (instead of suspending the vesting *ab initio*) point merely at the period when it becomes absolute. The principle of these cases obviously applies to residuary bequests framed in such terms. [Where real and personal estates are included in the same gift, and the real estate is held to be vested, the personal property follows the same construction, *Farmer v. Francis*, 2 S. & St. 505; *Tapscott v. Newcomb*, 6 Jur. 755; *James v. Lord Wynford*, 1 Sm. & Gif. 40. And *Parker v. C.*, 5 De G. & S. 200, said that

under twenty-four, but upon the death under twenty-four without leaving issue. If, upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four without leaving issue: all the cases upon the subject, except the one before Lord Gifford (*i. e.*, *Bull v. Pritchard*), are reconcilable with this distinction."

It is submitted, however, that [even if *Bull v. Pritchard* were not otherwise distinguishable] his Honor's own decision in *Vawdry v. Geddes*, (*h*) as well as that of his predecessor in *Barker v. Lea*, (*i*) if brought to the test of the principle of construction here propounded, would be found no less difficult to sustain than *Bull v. Pritchard*, for the reasons already suggested. It would certainly be a convenient rule of construction to say, that whenever, under a residuary bequest to children as a class, the vesting is, in the first instance, postponed to a given age, and this is accompanied by a direction that the intermediate interest [or a sufficient part of it] shall be applied for their maintenance; after which the testator proceeds to dispose of the shares of children dying under the age in question, either absolutely or upon some contingency, to the survivors, or to children, or any other person; the gift over is to be considered as explaining the testator's intention to be, that, under the preceding words, the *absolute* ownership only should be suspended until the prescribed age, and that, in the meantime, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event; [and the tendency of the modern decisions on bequests in this form, whether residuary or not, is almost uniformly in favor of such a rule.

Thus in *Taylor v. Frobisher*, (*k*) a testatrix directed £1000 to *be held in trust to invest until the same should be payable as Gift over held to favor vesting. thereafter mentioned, and to pay the income to A for life, and from and after her decease to pay the principal unto, between or amongst all and every the child and children of A in equal shares,

the M. R.'s distinction was not meant to be of general application, but referred only to the will then before him.]

(*h*) *Ante* p. *855.

(*i*) *Ante* p. *856, n.

[(*k*) 5 De G. & S. 191. See also *Ridgway v. Ridgway*, 4 De G. & S. 271, better

rep. 21 L. J., Ch. 256; *Carver v. Burgess*, 18 Beav. 541, 551, 7 D., M. & G. 96; *Pearman v. Pearman*, 33 Beav. 394; *Knox v. Wells*, 2 H. & M. 674; *Wetherell v. Wetherell*, 1 D., J. & S. 134; *Whitter v. Bremridge*, L. R., 2 Eq. 736.

or if but one such child then to such one, to be a vested interest or vested interests on their respectively attaining the age of thirty years; and if any child should die under that age without lawful issue, his or her share, as well original as accruing, to go to the survivors, and become vested at the same age as the original shares; there was a trust, after A's death until the shares of such child or children should become vested and payable, out of the income of the £1000 to apply for their maintenance so much as to the trustees seemed meet, not exceeding the interest of the expectant share of such child or children in the principal; and if all the children of A should die under the age of thirty years without issue, then over. It was held by Sir J. Parker, V. C., that "vested" must be read "indefeasible," and that the children took vested interests liable to be divested on death under thirty. He thought the conclusion to be drawn from the clause of accruer and from what followed it was irresistible, that a child dying under thirty retained his share in every event except where it was expressly given over. He added that *Bull v. Pritchard* was no exception to the rule as stated by Sir J. Leach, for in that case the gift was not to all the children, but only to a particular class, those, namely, who should attain twenty-three.

So in *Davies v. Fisher*, (l) where a testatrix gave the residue of her personal estate to trustees, in trust for W. D. for life, and after his decease, in trust for the children of the said W. D. as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one then the whole to such one child, the income to be applied during *their respective minorities* by the guardian for the time being of such children for their maintenance; and in case no child of the said W. D. should live to attain the age of twenty-five years, then in trust as therein mentioned. Lord Langdale, M. R., held that the children of W. D. took an immediate vested interest in the residue. The decision was, indeed, in a great measure, founded on the gift of the intermediate interest; (m) *but as to the argument resting on the *dicta* of Sir J. Leach in *Vawdry v. Geddes* and *Bland v. Williams*, that the gift over prevented the residue from vesting in the meantime, he cited authorities to show that such a pro-

[(l) 5 Beav. 201; see also *Harrison v. L. R.*, 19 Eq. 286, 291; In re *Baxter's* *Grimwood*, 12 Beav. 192; *Thomas v. Trusts*, 10 Jur. (N. S.) 845. *Wilberforce*, 31 Beav. 299; *Fox v. Fox*, (m) See *ante* p. *845.

position was untenable; (*n*) and observed that, on the contrary, the gift over afforded some evidence of an intention to divest after a previous vesting.

But a gift over limited to take effect on an event different from that upon which the primary gift depends, will not generally be construed as of itself indicating such an intention, (*o*) though it is sometimes called in aid of other arguments in favor of that construction; (*p*) for a gift over in *any* one event always helps the construction that until that event happens, the legacy is vested. (*q*)

Gift over on event different from event mentioned in primary gift.

The distinction drawn in *Bull v. Pritchard* between a gift to a class *if* or *when* they attain a specified age, and a gift to *such of* a class *as* attain a specified age, has been fully recognized in subsequent cases; and gifts over, (*r*) and gifts of intermediate interest, (*s*) which have been held to vest a bequest of the first kind in all the members of the class immediately, will generally, where the bequest is in the latter form, be treated not as enlarging the class, but only as regulating the mode or conditions in or upon which the members of it are to enjoy the bequest. (*t*) But, as already noticed, there are no words that may not be explained away by the context, and the restrictive effect of a gift to *such of* the children as attain a given age will be obviated by a direction that the legacy shall vest in a larger class or at an earlier age.] (*u*)

Distinction where the gift is to *such of* a class as attain given age.

Here it may be observed that a contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a certain age, or shall survive a given period or

Contingent interest transmissible—when.

(*n*) *Skey v. Barnes*, 3 Mer. 340; see also *Davidson v. Dallas*, 14 Ves. 576; *Heron v. Stokes*, 2 D. & War. 115, per Sugden, C.

(*s*) *Southern v. Wollaston*, 16 Beav. 166.

(*o*) *In re Wrangham's Trust*, 1 Dr. & Sm. 358; *Chadwick v. Greenall*, 3 Gif. 221.

(*t*) See also cases cited *ante* p. *850, n. (*h*). In *Bradley v. Barlow*, 5 Hare 589, the interest was given to "such children as," &c., and the principal to "all the children when and as," &c., and there being no necessary intendment that principal and interest were to go to the same persons, the gift of principal was held vested.

(*p*) *Bree v. Perfect*, 1 Coll. 128; *Lang v. Pugh*, 1 Y. & C. C. C. 718, 724, 725; *Ingram v. Suckling*, 7 W. R. 386.

(*q*) *Pearson v. Dolman*, L. R., 3 Eq. 322.

(*r*) *Bute v. Harman*, 16 Beav. 168, n., correcting 9 Beav. 320.

(*u*) *Jackson v. Dover*, 2 H. & M. 209; *Mappin v. Mappin*, W. N., 1877, p. 207; both cited *ante* p. *850.

event, the death *of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects; (x) and, consequently, such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time. Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.

Thus, where (y) a testator bequeaths his personal estate to A, and if he shall die without leaving issue, then over to B; in the event of B surviving the testator, and afterwards dying in the lifetime of A, testate or intestate, his contingent or executory interest will devolve to his executor or administrator (as the case may be.)

[So, in *Leeming v. Sherratt*, (z) where a testator gave his freehold and the residue of his personal property to trustees, upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom, so soon as his youngest child should attain the age of twenty-one, unto and equally amongst his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have; Sir J. Wigram, V. C., held that a child who attained his majority, but died before the youngest attained twenty-one, was, nevertheless, entitled to a share of the fund. The trustees, he said, are trustees of the residue for all the testator's children upon the happening of an event, which in fact has happened, namely, the youngest child attaining twenty-one. He added, that if there was any case which decided as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happened, did not confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

(x) *Read v. Gooding*, 21 Beav. 478; *Bayly*, Id. 195; *Barnes v. Allen*, 1 B. C. C. 181. *Sheffield v. Kennett*, 27 Beav. 207, 4 De G. & J. 593; In re *Watson's Trusts*, L. R., 10 Eq. 36; and see In re *Heath's Settlement*, 23 Beav. 193.]

(y) *Pinbury v. Elkin*, 2 Vern. 758, 766; *King v. Withers*, Cas. temp. Talb. 117, 3 B. P. C. Toml. 135; *Wilson v.*

[(z) 2 Hare 14. See also *Boulton v. Beard*, 3 D., M. & G. 608; *Brocklebank v. Johnson*, 20 Beav. 205; In re *Smith's Will*, Id. 197; *McLachlan v. Taitt*, 28 Beav. 407, 2 D., F. & J. 449.

*The child whose share was in question in the last case had attained the age of twenty-one, and the V. C. thought that as the testator had postponed the division of the residue until his youngest child attained that age, no child who did not attain that age could have been intended to take a share therein. (a) But if the bequest be not to a class but to named individuals, it seems the rule is different. Thus, in *Cooper v. Cooper*, (b) a testator devised his real estate to trustees upon trust to raise out of the rents and profits an annuity of £100 for his wife, and to apply the remainder for the maintenance of his said children (the testator had previously named them) till the youngest should attain twenty-one; then upon trust to sell subject to the annuity, and pay the moneys arising therefrom unto and between his said children in manner following, that is to say, unto his said eldest son two-fifth parts, and one-fifth part to each of his other children (naming them.) One of the children died under twenty-one. It was held by Sir J. Romilly, M. R., that the children's shares were vested at the testator's death, and were not contingent on their attaining twenty-one. He distinguished *Leeming v. Sherratt* on the ground that the class who were there to take were the children who had attained twenty-one; that this was clear by the circumstance that the gift of the residue was not to take effect until the whole of the class had attained twenty-one, and therefore the class was to be ascertained at that time. Here if the devise had stopped at the word children, the case would have been governed by *Leeming v. Sherratt*, but the testator went on to say "in the shares and proportions following, that is to say." It was not, therefore, a gift to a class, but on the happening of a particular event, the residue was to be divided into four unequal shares to be given to four named individuals; and he observed that (unlike what would have been the case if the gift had been to a class) the share of the deceased child, if not vested in her, was undisposed of by the will; and he considered it to be a gift, on the youngest attaining twenty-one,

(a) See also *Parker v. Sowerby*, 1 Drew. 488, 496, fuller 17 Jur. 752; *Lloyd v. Lloyd*, 3 K. & J. 20, stated *ante* p. *846. In the last case the V. C. is reported to have said, "The distribution is to be among those who shall be receiving the rents and profits when the youngest attains twenty-one," which would have excluded those who attained twenty-one but died before the youngest attained that age: but he had just before said, "the testator must be understood as saying 'I intend this for the benefit of all those children who attain twenty-one,' which is in conformity with *Leeming v. Sherratt*."

(b) 29 Beav. 229; In re Smith's Will, 20 Beav. 197.

to four specified persons, and that the circumstance *that they constituted a class for whose maintenance the income of the fund was to be devoted before the happening of the event did not convert them into a fresh and distinct class. If, however, after such a bequest *nominatim*, the shares of any of the legatees who die before the youngest attains twenty-one are given over in every event, as, to issue if there are any, but if none to survivors, it is clear nothing is intended to vest until the period of distribution even in a legatee who attains twenty-one.](c)

(c) In re Hunter's Trusts, L. R., 1 Eq. 295.]

[*863]

* CHAPTER XXVI.

EXECUTORY DEVICES AND BEQUESTS.

An executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; for it is well settled ^{Executory devise—what.} (and, indeed, has been remarked as a rule without an exception,) that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise. (a) It is necessary, therefore, in treating of this species of estate, first, to ascertain what constitutes a remainder. A remainder may be described to be an estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument. It follows, that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (b) (whether consisting of one or more testamentary papers,) or which, being so preceded, is limited to take effect *before* or *after*, and not *at* the expiration of such prior estate of freehold, is an executory devise.

The first mentioned species of executory estate occurs, as well where the devise is future in its operation, from the non-existence of the object at the death of the testator, as where it is future in the express terms of its limitation. Thus, a devise to the children of A, who happens to have no child at the death of the testator, (c) or to the heirs of the body of A, a person then living, is executory, (d) for the reason suggested. The creation

Devise executory for want of a preceding freehold.

(a) *Purefoy v. Rogers*, 2 Lev. 39, 2 Saund. 380; *Reeve v. Long*, Carth. 310; *Goodright v. Cornish*, 4 Mod. 258. [But this rule is now qualified by stat. 40 and 41 Vict., c. 33, presently noticed.]

(b) See *Key v. Gamble*, 2 Jones 123; *Moore v. Parker*, 1 Ld. Raym. 37, Skinn. 558; *Doe v. Earl of Scarborough*, 3 Ad. & El. 2, 897.

(c) *Hopkins v. Hopkins*, Cas. temp. Talb. 44; *Stephens v. Stephens*, Id. 228; *Gore v. Gore*, 2 P. W. 28, 2 Stra. 958; *Bullock v. Stones*, 2 Ves. 521.

(d) *Snowe v. Cutler*, 1 Lev. 135, T. Raym. 162; *Doe v. Carleton*, 1 Wils. 225; *Harris v. Barnes*, 4 Burr. 2157; *Doe d. Fonnereau v. Fonnereau*, Dougl. 487; *Doe d. Mussell v. Morgan*, 3 T. R. 763.

of a term of years, determinable with the life of the ancestor, to whose heirs the subsequent limitation is made, of course does *not vary the principle; a chattel interest being inadequate to support a contingent remainder. (e) Thus, if lands are devised to A for ninety-nine years, if he shall so long live, remainder to the heirs of the body of A, the fee simple, subject to the term, descends to the heir-at-law of the testator during the life of A, at whose decease an estate tail vests in the heir of his body by executory devise. So, a devise to a person or persons, whether *in esse* or not, to take effect at a given period after the death of the testator, as to A at the death of B (a stranger,) or at six months from the testator's decease, obviously belongs to the class of limitations under consideration. (f)

With respect to the cases in which the devise is executory, notwithstanding the creation of a prior estate of freehold, it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate must not be merely *liable* to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent,) but it must be *necessarily* determinable before the taking effect of the ulterior devise. Thus, a devise to A for life, and, after his decease, to the unborn children of B, is a contingent remainder in such children, because as A *may* live until B has a child, there is not necessarily any interval between the two estates; but, under a devise to A for life, and after his decease, *and one day*, to the children of B, the children would take by executory devise; and the interval of a day, which would be undisposed of, would belong to the residuary devisee, (g) if any, or if not, to the heir.

It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a remainder, that it wait for the regular expiration of such estate. Thus, in the case of a devise to A for life, or in tail, with a limitation over to B, in case A shall become entitled in possession to a certain estate, or shall omit to assume a certain name, this is an executory devise to B. (h)

(e) *Vide supra*, n. (d).

(f) *Reding v. Stone*, 8 Vin. Ab. 215, pl. 5; and see *Clarke v. Smith*, 1 Lutw. 798.

(g) *Supra*, p. *645.

(h) *Nicholl v. Nicholl*, 2 W. Bl. 1159;

Nicolls v. Sheffield, 2 B. C. C. 215; *Doe d. Heneage v. Heneage*, 4 T. R. 13; *Carr v. Earl of Erroll*, 6 East 58; *Stanley v. Stanley*, 16 Ves. 491; *Doe d. Kenrick v. Beauclerk*, 11 East 657.

It will be apparent from what has been stated, that every devise to a person in derogation of, or substitution for, a preceding estate in fee simple is an executory limitation. Thus, in the case of a devise to A and his heirs, and if he shall die under twenty-one and without issue (*i. e.*, without issue living at his death,) or if he shall die without issue living B, then to B; in each of these cases the devise to B is executory, (*i.*) in the same manner as if the fee, instead of being limited to A, had been suffered to descend to the heir-at-law of the testator, and the property had been simply devised to B on either of such events; the only difference being, that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeasance of a prior estate in fee.¹

Executory devise in derogation of a preceding fee.

(*i.*) Cro. Jac. 592; Palm. 131; Gilb. 393; 2 Mod. 289; Pre. Ch. 67; Id. 486; 10 Mod. 419; Cas. temp. Talb. 228; 8 Vin. Ab. 112, pl. 38; 1 B. C. C. 147; 3 T. R. 143; 2 B. & P. 324; 10 East 460; 1 B. & Ald. 530; Id. 713; 2 Id. 441; [1 Eq. Cas. Ab. 186, pl. 1; 1 Wils. 105; Fea. C. R. 396; 10 B. & Cr. 201.] Many of these cases are stated *supra*.

1. Limitations over on the death of the first taker without issue are either construed as remainders, on indefinite failure of issue, after an estate tail, or as executory devises on definite failure of issue after an estate in fee simple. The former construction has the preference by the well-known rule preferring a remainder, where it is possible. *Johnson v. Valentine*, 4 Sandf. S. C. 36; *Parker v. Parker*, 5 Metc. 134; *Hawley v. Northampton*, 8 Mass. 3; *Haines v. Witmer*, 2 Yea. 400; *Wall v. Maguire*, 21 Penna. St. 248; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Manderson v. Lukens*, 23 Penna. St. 31; *Vedder v. Ewartson*, 3 Paige 281; *Criley v. Chamberlain*, 30 Penna. St. 161; *Stehman v. Stehman*, 1 Watts 466.

In *Taylor v. Taylor*, 63 Penna. St. 481, where there was a devise to A for life, and if she die leaving issue, "they to

enjoy their mother's right," and if not leaving issue, over, it was held that a definite failure of issue was intended, but that A took a life estate with remainder, not executory devise, over; so, too, *Leslie v. Marshall*, 31 Barb. 560; *Waddell v. Rattew*, 5 Rawle 231. In *Way v. Gest*, 14 Serg. & R. 40, a devise to testator's daughters for life, and if they die without issue, to grandchildren who should arrive at the age of twenty-one, was construed to be a contingent remainder.

For instances of such limitation being construed as a remainder, see *Willis v. Bucher*, 3 Wash. C. C. 369; *Patterson v. Ellis*, 11 Wend. 259; *Parker v. Parker*, 5 Metc. 134; *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrill*, 15 Pick. 104, although in both of these last-named cases the limitation was to the "other" or the "survivor" of the first takers on death without issue. So, too, *Haines v. Witmer*, 2 Yea. 400. In *Hannan v. Osborn*, 4 Paige 336, a devise to A and her children, and if they all die leaving no children, was held to be a vested remainder, and not an executory devise, although by statute the leaving no children related to the time of A's death. In general where the failure is for any rea-

The short but comprehensive definition of an executory devise before given, will be found to comprise every class of limitations of this nature, and, perhaps, will be more easily understood and remembered

son intended to be an indefinite failure, the limitation over is construed to be a remainder, *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Ferris v. Gibson*, 4 Edw. 707; *Tator v. Tator*, 4 Barb. 431; *Van Vechten v. Pearson*, 5 Paige 512; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Morehouse v. Cotheal*, 1 Zab. 480; *Jackson v. Billinger*, 18 Johns. 368; *Goddard v. Goddard*, 10 Penna. St. 79; *Vaughan v. Dickes*, 20 Penna. St. 509; *Criley v. Chamberlain*, 30 Penna. St. 161; *Curran v. McMean*, 55 Penna. St. 487; *Hill v. Hill*, 74 Penna. St. 173; and see *Wall v. Maguire*, 21 Penna. St. 248, where a gift was to A, B and C, and the survivor of them, if B and C leave no heirs. A died first, and it was held that B and C took estates tail with cross-remainders.

For instances of such limitation being construed as an executory devise upon definite failure, see *Jackson v. Chew*, 12 Wheat. 153, a devise to several in fee, and if either die without issue, to the survivor; *Weller v. Weller*, 28 Barb. 588; *Jackson v. Elmendorf*, 3 Wend. 222; *Couch v. Gorham*, 1 Conn. 36; *Russ v. Russ*, 9 Fla. 105; *Nunally v. White*, 3 Metc. (Ky.) 584; *Hart v. Thompson*, 3 B. Mon. 482; *Richardson v. Noyes*, 2 Mass. 56, and note; *Jackson v. Thompson*, 6 Cow. 178; *Guernsey v. Guernsey*, 36 N. Y. 267; *Dumont v. Stringham*, 26 Barb. 104; *Fosdick v. Cornell*, 1 Johns. 440; *Jackson v. Blanshan*, 3 Johns. 292; *Jackson v. Merrill*, 6 Johns. 185; *Moffat v. Strong*, 10 Johns. 12; *Jackson v. Staats*, 11 Johns. 337; *Adams v. Beekman*, 1 Paige 631; *Pond v. Bergh*, 10 Paige 140; *Varick v. Edwards*, 11 Paige 289; *Davison v. De Freest*, 3 Sandf. Ch. 456; *Jackson v. Christman*, 4 Wend. 277; *Myers v. Craig*, 1 Busb. L. 169; *Sutherland v. Cox*, 3 Dev. L. 394; *Garland v. Watts*, 4 Ired. Eq. 287; *Pendleton v. Pendleton*,

2 Murph. (N. C.) 82; *Rapp v. Rapp*, 6 Penna. St. 45; *Johnson v. Curran*, 10 Penna. St. 498, (but this case was doubted in *Curran v. McMean*, 55 Penna. St. 487); *Toman v. Dunlop*, 18 Penna. St. 72; *Nicholson v. Bettle*, 57 Penna. St. 384; *Coates' St.*, 2 Ash. 12; *Mifflin v. Neal*, 6 Serg. & R. 460; *Hauer v. Suetz*, 2 Binn. 532; *Morris v. Potter*, 10 R. I. 58; *Seddel v. Wills*, Spenc. 223; *Den v. Howell*, Id. 411; *Eby v. Eby*, 5 Penna. St. 461; *Wilkes v. Lion*, 2 Cow. 333; *Lion v. Burtiss*, 20 Johns. 483; *Anderson v. Jackson*, 16 Johns. 382; *Vedder v. Evartson*, 3 Paige 281; *Neave v. Jenkins*, 2 Yea. 414; *Burfoot v. Burfoot*, 2 Leigh 119, 133. So where the failure of issue is made definite at the first taker's death by statute, *McKee v. Means*, 34 Ala. 349; *Macombe v. Miller*, 26 Wend. 229; *Wilson v. Wilson*, 32 Barb. 328; *Pinkham v. Blair*, 57 N. H. 226; or expressly by the terms of the will, *Heard v. Horton*, 1 Denio 165; *Bradhurst v. Bradhurst*, 1 Paige 331; *Att.-Gen. v. Wallace*, 7 B. Mon. 611; or by anything in the context, *Den v. Alaire*, Spenc. 6; *Den v. Snitcher*, 2 Gr. (N. J.) 53; *Armstrong v. Kent*, 1 Zab. 509; *Hill v. Hill*, 4 Barb. 419; *Langley v. Heald*, 7 Watts & S. 96; *Kennedy v. Kennedy*, 5 Dutch. 185; *Hall v. Chaffee*, 14 N. H. 215; *Scott v. Price*, 2 Serg. & R. 59; *Jones v. Miller*, 13 Ind. 337; *Rucker v. Lambdin*, 12 Sm. & M. 231; *Berg v. Anderson*, 72 Penna. St. 87; *Hill v. Hill*, 74 Penna. St. 173; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Kelso v. Dickey*, 7 Watts & S. 279; or to A in fee, provided he have lawful issue, and if he die "leaving no issue living," to B, *Wallington v. Taylor*, Saxt. 314; or "if he leave not legitimate heirs," *Prindle v. Beveridge*, 7 Lans. 225; or where the limitation over is on death without children, *Sherman v. Sherman*, 3 Barb. 385;

by the student, than the more elaborate classification which has been generally presented to him. A learned writer, whose labors on this

or without leaving issue "and without leaving a wife," *Den v. Gibbons*, 2 Zab. 117; or without "an heir * * * before arriving at the age of twenty-one," *Lippett v. Hopkins*, 1 Gall. C. C. 454; *Barnitz v. Casey*, 7 Cranch. 456.

So a limitation over on death without issue before the age of twenty-one is an executory devise, *Den v. English*, 2 Harr. 281; *Den v. Taylor*, 2 South. 413; *Bell v. Scammon*, 15 N. H. 381; *Robinson v. Adams*, 4 Dall. xii; *Ray v. Enslin*, 2 Mass. 554; *Scott v. Price*, 2 Serg. & R. 59; *Booker v. Booker*, 5 Humph. 505; *Ackless v. Seekright*, Breese 76; or if he die unmarried and without issue, *Deihl v. King*, 6 Serg. & R. 29; or "if he die childless," *Smith v. Hunter*, 23 Ind. 580; or to A, and "if he die without issue before B," to B, *Hilleary v. Hilleary*, 26 Md. 275; or "without a lawful heir or heirs," *Jones v. Miller*, 13 Ind. 337; or before coming into possession, *Ferson v. Dodge*, 23 Pick. 287. So the words, "it is my will and desire that if any of my children die without heirs, for their part to be equally divided amongst all of my children then living," constitute a good executory bequest in favor of the survivors, *Norris v. Johnston*, 17 Gratt. 8. And in such case on the death before testator of the person designated as the first taker, the executory devise takes effect at the testator's death as an original gift, *Eaton v. Straw*, 18 N. H. 320; *Goddard v. Goddard*, 10 Penna. St. 79.

A devise to "the first of" testator's brothers and sisters "that shall come from Ireland" is a valid executory devise, *Chambers v. Wilson*, 2 Watts 495. So a devise to A "when B shall attain the age of twenty-one," *In re Sanders*, 4 Paige 293; *Rogers v. Ross*, 4 Johns. Ch. 388; or to B in fee, and, if B die before marriage, to A, *Jessup v. Smuck*, 16 Penna. St. 327; or if the first taker die

before he come to enjoy the property, *Harris v. Potts*, 3 Yea. 141. So to A, "if he become a citizen," *Beard v. Rowan*, 1 McLean C. C. 135; to executors, "or such of them as shall qualify," *May v. Hill*, 5 Litt. (Ky.) 307. A devise to A limited after a life estate, "if he does not obtain" certain other land in litigation, is construed to be an executory devise, *Morton v. Funk*, 6 Penna. St. 483. So a limitation over upon a condition which destroys the precedent estate, *Church in Brattle Square v. Grant*, 3 Gray 142. And a devise limited after an estate for years to A, to take effect on the death of A, and her children, or the survivors attaining twenty-one, can only take effect as an executory devise, *Holm v. Low*, 4 Metc. 190. And a gift to children *to be born* is good as an executory devise, *Dunn v. Bank of Mobile*, 2 Ala. 152; *Annable v. Patch*, 3 Pick. 360; *Rupp v. Eberly*, 79 Penna. St. 141; *Wells v. Ritter*, 3 Whart. 208; *Hoge v. Hoge*, 1 Serg. & R. 144. So to a man's wife and children, "if he should have any," *Mitchell v. Long*, 80 Penna. St. 516; *Flournoy v. Johnson*, 7 B. Mon. 693.

But a life estate to the testator's widow, and on her death or marriage to her "children who may then be alive or who may have left legitimate heirs," is a vested remainder and not an executory devise, *Manderson v. Lukens*, 23 Penna. St. 31; and see other cases to the same effect in the preceding chapter. For other illustrations of executory devises see 2 Washb. R. P. 632; 2 Redf. on Wills 261.

And where a devise is made to A, and if he die "without a lawful heir or heirs," over, a conveyance by A during his life, he dying without children, (the words "*lawful heir or heirs*" being construed in the limited sense of children,) can neither destroy or otherwise affect the estate

subject are well known to the profession, (*k*) has added to the distribution of the cases adopted by Mr. Fearne, (*l*) several classes, two of which, though they clearly fall within the terms by which this species of interest has been before described, are sufficiently peculiar to entitle them to distinct notice.

First. Where an estate tail, or an estate in fee simple, is in **some* event reduced to an estate for life. As where (*m*) a testator devised real estate to his two daughters, their heirs and assigns; but if either of them should marry without the consent of his executors, the daughter so marrying should have an estate for life therein; if either of them should die unmarried, then R to take it, paying the other daughter £500. It was held, that on one of the daughters marrying without consent, her estate was cut down to an estate for life.

Estate in fee or in tail reduced to an estate for life.

Secondly. Where an estate is limited in derogation of a preceding estate, and in *partial* exclusion of the same. As where (*n*) a testator devised certain lands to his son B in fee, and other lands to his son C in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one,

Estate partially defeated by executory limitation.

over, *Jones v. Miller*, 13 Ind. 337; *Smith v. Hunter*, 23 Ind. 580. But in Maryland, under the statute, such an interest in land may be sold under a decree of the Court of Chancery, for the court will make such disposition or investment of the proceeds of the sale as will preserve its subjection to the contingencies imposed by the will, *Harris v. Harris*, 6 Gill & J. 111, 115.

(*k*) 2 Prest. Treat. on Abstracts 139.

Mr. Fearne's position, that a condition or limitation must defeat the whole estate, questioned.—(*l*) For which see *Doe v. Carleton*, 1 Wils. 225; [Fea. C. R. 400.] These two classes of cases show that Mr. Fearne's position (C. R. 251 and 530, 8th ed.,) "that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder," must be received with some qualification. A condition properly so called, namely, which descends upon the

heir, necessarily determines the whole estate, which is subject to it; but it is difficult to perceive upon what principle any objection can be advanced to an executory devise, to take effect in partial derogation of a preceding estate, on the ground that it defeats that estate in part only; and it is observable, that, in all the cases cited by this able writer in illustration of his doctrine, the limitation over was either defective in the terms of its creation (on which, however, some remarks will be found in the sequel (see *Corbet's Case*, 1 Rep. 83 b; and other cases observed upon, ch. XXVII., § 2,)) or was repugnant to the nature and incidents of the estate on which it was engrafted; or was contrary to the rule of law fixing the period within which such interests must be limited to arise.

(*m*) *Wright v. Wright*, 1 Ves. 409, Fea. C. R. 500.

(*n*) *Hanbury v. Cockerell*, 1 Roll. Ab. 835, Fea. C. R. 396.

and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, as one of them had attained twenty-one, and died unmarried, the survivor was entitled to his moiety for life.

As this case simply affirmed the validity of the devise over for life, leaving untouched the destination of the ulterior interest, it cannot, perhaps, be treated as a direct adjudication on the point for which it is here cited, [namely, that the estate originally devised was affected only to the extent necessary for the introduction of the life interest, and subject thereto remained in the prior devisee:] yet, upon principle, there can be, it is conceived, no doubt as to the doctrine in question; and which, indeed, has now the support of [an express decision in its favor; (o) as well as of another] case which appears to have decided, that where a devise in fee is followed by an executory limitation in fee, in favor of an object or class of objects not *in esse*, and who, in event, never come into existence, the first devise remains absolute. ²

Remark on
Hanbury v.
Cockrell.

Effect where
executory gift
never takes
effect.

The case last alluded to is *Jackson v. Noble*, (p) where a testator gave real and personal estate to his daughter A, and to two other persons, upon trust to permit A to receive the rents and interest for life, for her separate use, and, after her decease, in *trust to convey to her heirs, executors, &c.; but in case A should marry, and have no child or children, then the property to belong to B; or in case of his decease before A, then to his children. A married, but had no child: B died in her lifetime, without issue. Lord Langdale, M. R., held, that A took an absolute equitable estate, with an executory gift over to B and his children, and that B, having died in the lifetime of A, leaving no child, the title of A remained undefeated.

Substituted
devise failing,
first devise
held to be ab-
solute.

[This case has indeed been referred to the narrower ground that the contingency there contemplated on which the gift over was to take

[(o) *Gatenby v. Morgan*, 1 Q. B. D. 685.]

2. If an executory devise fails, the preceding estate is made absolute, *e. g.*, where the executory devisee dies before the tes-

tator, *Drummond v. Drummond*, 11 C. E. Gr. (N. J.) 234; see also *Church in Brattle Square v. Grant*, 3 Gray 142.

(p) 2 Kee. 590.

effect had not happened; (q) and it seems that however reasonable the rule above suggested as being deducible from it, the case cannot with certainty be relied on to that extent; while the more general inference that in all cases where the executory devise is void from any cause whatever, the prior devise is absolute is contradicted by *Doe d. Blomfield v. Eyre*,^(r) where M. S. having an exclusive power of appointing lands by will amongst her children, appointed them to her eldest son, J. B., in fee; but if J. B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J. B. and his brother both died in their father's lifetime, and it was held, in the Exchequer Chamber, that although the father could not take, yet the son lost the estate. Parke, B., delivered the judgment of the court, and after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, he said, "If a testator seized in fee were to devise a real estate to A. B. in fee, and to direct that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely was perfectly clear that if A. B. should die in the lifetime of J. S. he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate.' That which defeated *the estate of J. B. was the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers."

The case put by Parke, B., of a devise over to a charity, afterwards came before Sir R. Kindersley, V. C., who felt himself bound to decide it in conformity with *Doe v. Eyre*, though not approving of the doctrine of that case. He thought a strong argument against it might have been found in the statute,^(s) which declared all gifts to

[(q) By Kindersley, V. C., *Robinson v. Wood*, *post*. Lord Langdale thus expressed himself: "The question is whether the particular event on which the vested estate was to be divested can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion that the gift over was to take effect only in the event of A marrying

and dying without issue in the lifetime of B or of such child or children as he might happen to leave; and as B died in A's lifetime and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in A cannot now be divested."

(r) 5 C. B. 713.

(s) 9 Geo. II., c. 36, § 3.

charity, not made as therein provided, void to all intents and purposes; he also thought it very difficult to reconcile *Jackson v. Noble* with *Doe v. Eyre*, but concluded that the ground of the decision in the former was that the contemplated contingency had not happened. (t)

But to the rule thus laid down in *Doe v. Eyre*, the case of a gift over which is to defeat a prior devise in a too remote event forms an exception, (u) since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute.]

Exception where substituted gift is void for remoteness.

On the same principle as that which governs devises of realty it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, subject to such executory gift for life, be absolutely entitled. It might appear to be a further deduction from this doctrine, that if the second gift were a contingent bequest of the entire interest in the property, and not for life only, and such contingent and substituted bequest failed in event, the prior legacy, in derogation of which the same was to take effect, would remain absolute; and *Taylor v. Langford* (x) seems to lend some countenance to

Same rules as to personalty, where executory gift is for life only;

—where executory gift never takes effect.

(t) *Robinson v. Wood*, 4 Jur. (N. S.) 625, 27 L. J., Ch. 726. See Sug. Pow. 514, (8th ed.), where *Doe v. Eyre* is approved. But see *Ridgway v. Woodhouse*, 7 Beav. 437.

(u) Sug. Pow. 514 (8th ed.)]

(x) 3 Ves. 119. See also *Harrison v. Foreman*, 5 Ves. 207, and other cases stated *ante*, *827, *et seq.* *Joslin v. Hammond*.—But *Joslin v. Hammond*, 3 My. & K. 110, shows that too much caution cannot be exercised in forming any such conclusion. In that case, a testator bequeathed to his wife A, whom he appointed executrix, the whole of his property, on condition of her paying to his mother £130 per annum during her life, and added, “at the death of my dear wife A, the whole of the property to be equally divided amongst those of my children who may survive her;” and should his

wife marry again, the testator directed that each of his children at the age of twenty-four be paid £400; should she not marry, he left them implicitly to her kind and indulgent care. No child of the testator survived the widow. It was contended, therefore, that the widow was absolutely entitled, on the ground that the absolute interest which she would have taken under the first words of the will, was cut down to a life interest only in a certain event which had not happened; but Sir J. Leach considered that, upon the whole context of the will, it was the intention of the testator that in no event the wife should have other than a life estate. “If,” said his Honor, “at her death, a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of

the hypo*thesis. [Even where there was in the first place a distinct clause declaring that in a certain event the previous gift should be forfeited, and then followed a gift over in the same event, which gift failed for remoteness, Sir C. Hall, V. C., said, "When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?" and he refused to read one separately from the other. (y) However, in *O'Mahoney v. Burdett*, (z) where a legacy was bequeathed to A for life, remainder to her daughter; but if the daughter should die unmarried or without children, then to B; B died in the testator's lifetime, and afterwards the daughter died without ever having a child. *Doe v. Eyre* and *Jackson v. Noble* were cited, and it was held in D. P. that the gift to the daughter was defeated, although the gift over had failed by lapse. Lord Selborne said "he had doubted whether, under the circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee; but that the argument on that point and the authority cited by the respondent (*qu. appellant*) had satisfied him that the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testator, operated (when the contingency had happened on which the gift to the person was made to depend) for the benefit of the residuary legatee or next of kin." It seems therefore that *Doe v. Eyre* furnishes the rule as well for personal as for real estate.

An exception exists however in those cases (which are of frequent occurrence) where personalty is bequeathed to individuals or to a class, to come into possession at a future period (as, after a life estate to A,) and in case any of them should die before the period of distribution, then to their children;

Exception where children substituted on death of original legatees.

his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator, that, if his children died in the lifetime of his wife, leaving families, his widow, on her second marriage, should enjoy the whole property." His Honor did not advert to the annuity to the mother. [See *Lassence v. Tierney*, 1 Mac. & G. 551.

(y) *Hodgson v. Halford*, 11 Ch. D. 959, 963. Though this was a case of remote-

ness (which is an exception to the rule founded on *Doe v. Eyre*; see *Courtier v. Oram*, 21 Beav. 91; *Webster v. Parr*, 26 Beav. 236,) the V. C.'s observation was in answer to an argument (for which, however, there appears to have been insufficient ground) that though the gift over was remote the clause of forfeiture was not, and that the latter might operate alone.

(z) L. R., 7 H. L. 388, 407.

here, the original gift is divested only in the case of those who have *children. Thus in *Smither v. Willock* (a) where there was a bequest to the testator's wife for her life, and after her death to his brothers and sisters, named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying were to be divided between his or her children: one of the testator's brothers died in the widow's lifetime, without having ever had a child; and Sir W. Grant declared his share to be vested, subject to be divested only in the event of his death in the lifetime of the widow, leaving children: and consequently, that event not having happened, his representative was entitled.]

It seems too, that, where a testator, in the first instance, divides his property among his children, and then proceeds to declare certain trusts of his daughters' shares in favor of themselves and their children, these trusts are considered as defeating only *pro tanto* the absolute interests antecedently given to the daughters in common with the other children.

Effect where absolute interests are first given, and then trusts declared of shares of certain objects.

As, in *Whittell v. Dudin*, (b) where the testator directed the residue of his property to be equally divided between his wife, and sons and daughters, subject, as to the shares of the daughters, to certain trusts for the benefit of themselves, and their children; Sir T. Plumer, M. R., held that a daughter dying without a child was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among his children, which would be frustrated if the shares of daughters were to go to the testator's next of kin as undisposed-of property, on their dying without children.

And the same construction prevailed in *Hulme v. Hulme*, (c) where a testator, in the first instance, made an absolute gift to all his children by his second wife, who should be living

Qualifying trusts operate *pro tanto* only.

(a) 9 Ves. 233. See also *Hervey v. Eaton v. Barker*, 2 Coll. 124; *Dawson v. M'Laughlin*, 1 Pri. 264; *Salisbury v. Bourne*, 16 Beav. 29; In re *Young's Settlement*, 18 Beav. 199; *Lyddon v. Ellison*, 19 Id. 565; *Gurney v. Goggs*, 25 Id. 334;

(b) 2 J. & W. 279.

(c) 9 Sim. 644. See also *Billing v. In re Corbett's Trust*, Joh. 591; *Norman v. Kynaston*, 3 D., F. & J. 29. In *Mayer v. Townsend*, where the primary gift was absolute to a daughter, followed by a direction to invest in trust for her, for her separate use for life, and after her death

when *the youngest should attain twenty-one. He then superadded a direction for settling the shares of the daughters, upon trust for them for life, and then for their children. One of the daughters having died childless, it was held that her share belonged absolutely to her representatives. Sir L. Shadwell, V. C., observed, "The absolute gift remains, except so far as the direction for settling the shares of the daughters has taken it away, and it is not taken away in the case of a daughter dying without having children."

[The rule (which applies to shares of males as well as to shares of females,) (d) is thus stated by Lord Cottenham: "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee." (e)]

It is in the determination of this previous question, whether, namely, the gift to the primary legatee is absolute or qualified, that the real difficulty of these cases generally lies. The intention is, of course, to be collected from the whole will. Suppose, for instance, that after the gift to the primary legatee there are gifts over in alternative contingencies exhausting every possible event: this is wholly inconsistent with an intention that there should, in any event, be an absolute gift to the primary legatee. But the point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction

to her children, *with power to her to appoint a life interest to her husband*. It was contended, that the intention could not have been to give her an absolute interest, even if there were no children, because a husband surviving her might take the property absolutely. Lord Langdale ap-

prehended there would be a great deal to say on that point; but it did not arise.

(d) *Norman v. Kynaston*, 3 D., F. & J. 29.

(e) *Lassence v. Tierney*, 1 Mac. & G. 561.

of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the intention was; and no doubt a disposition of the whole property, under all circumstances that can arise, is an important consideration in putting a construction on ambiguous *expressions. It does not seem possible that the two intentions could exist together: if they are both found in the same will, the court may have to decide which is to prevail; (f) but if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous. (g)

Where there is a legacy subject to be defeated by the exercise of a discretionary power, and that power is extinguished, the legacy of course becomes absolute.] (h)

Gift subject to a power which is extinguished.

The essential quality in executory devises, which gave to the distinction between them and contingent remainders its chief importance [was] this,—that such interests [were and still] are not in general liable to be affected by any alteration in the preceding estate: (i) ³ while, on the other hand, as the rule was that a contingent remainder must take effect, if at all, at the instant of the determination of the preceding

Executory interests not affected by acts of owner of precedent estate.

Destructibility of contingent remainders;

(f) See *Findon v. Findon*, 1 De G. & J. 380; *In re Lord Sondes' Will*, 2 Sm. & G. 416; *Salmon v. Salmon*, 29 Beav. 27.

(g) Per Lord Cottenham, *Lassence v. Tierney*, 1 Mac. & G. 562, 567; *Reid v. Reid*, 25 Beav. 469; *Butler v. Gray*, L. R., 5 Ch. 26. Other cases where the primary gift has been held not absolute are *Rucker v. Scholefield*, 1 H. & M. 36; *Scawin v. Watson*, 10 Beav. 200; *Gompertz v. Gompertz*, 2 Phil. 107; *Whitehead v. Rennett*, 22 L. J., Ch. 1020; *Waters v. Waters*, 26 L. J., Ch. 624; *Fulerton v. Martin*, 1 Dr. & Sm. 31; *Savage v. Tyers*, L. R., 7 Ch. 356; *Nevill v. Boddam*, 28 Beav. 554 (revocation by codicil of absolute gift by will and substitution of qualified gift.)

In the following cases the first gift was held absolute: *Campbell v. Brownrigg*, 1 Phil. 301; *Lord v. Lord*, 3 Jur. (N. S.)

485; *Watkins v. Weston*, 3 D., J. & S. 434 (indefinite gift of rents of leaseholds;) *McCulloch v. McCulloch*, 3 Gif. 606; *Combe v. Hughes*, 2 D., J. & S. 657; *Martin v. Martin*, L. R., 2 Eq. 404; *Kellett v. Kellett*, L. R., 3 H. L. 160.

(h) *Keates v. Burton*, 14 Ves. 434.]

(i) *Pells v. Brown*, Cro. Jac. 590.

3. When the first taker has an absolute power of disposal, by which the limitation over may be defeated, there can be no valid executory devise, *McDonald v. Walgrove*, 1 Sandf. Ch. 274; so *Ide v. Ide*, 5 Mass. 500, where there was a devise to A, and if he die leaving no heir, "what estate he may leave" over; so *Burbank v. Whitney*, 24 Pick. 146; *Burleigh v. Clough*, 52 N. H. 267; *Jackson v. Bull*, 10 Johns. 18; *Jackson v. Delancy*, 11 Johns. 365, affirmed 13 Johns. 537; *Jackson v. Robins*, 15 Johns. 169, affirmed 16 Id. 537.

estate, it followed that any act by the owner of the prior estate of freehold, which amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders, the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. [But their destructibility by such an act is now a doctrine of little practical importance, since, —cured by statute. by statute 8 and 9 Vict., c. 106, § 8, contingent remainders are made “capable of taking effect notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold in the same manner in all respects as if such determination had not happened.”]

But it is obvious that a contingent remainder may be of such a nature as to admit the possibility of its continuing in suspense or contingency after the regular determination of the previous *estate of freehold. For instance, suppose freehold lands to be limited to A for life, with remainder to such of the children of A as shall attain the age of twenty-one years, it is evident, that if all the children of A happen to be under age at the time of A's decease, the remainder to the children would, according to the rule before referred to, wholly fail [unless preserved by an estate limited to trustees] during the life of A, and the further period of the possible minority of one at least of the children. (k)

But every devise operates according to the state of the objects at the death of the testator; so that, if (in the case put,) A died in the lifetime of the testator, the devise to his children would become executory, precisely as if it had been originally limited to them without any preceding freehold, (l) [and would take effect accordingly. ⁴

The total failure to which such a limitation was liable as a remainder is now prevented by statutes 40 and 41 Vict., c. 33, (2d Aug., 1877,) which enacts that, “every contingent remainder created by any instrument *executed after the passing of this act*, or by any will or codicil revived or republished by any will or codicil

—Stat. 40 and 41 Vict., c. 33.

[(k) *Festing v. Allen*, 12 M. & W. 279; *Holmes v. Prescott*, 33 L. J., Ch. 264; *Cunliffe v. Brancker*, 3 Ch. D. 393.]

[(l) See *Hopkins v. Hopkins*, Cas. temp. Talb. 228, 1 Atk. 581, 1 Ves. 268; *Doe d. Scott v. Roach*, 5 M. & Sel. 481.

4. Where a limitation originally construed as a remainder is defeated by fail-

ure of the preceding estate, it may take effect as an executory devise, *e. g.*, where the preceding life estate was devised to the testator's widow, and she elected not to take it, *Thompson v. Hoop*, 6 Ohio St. 480; *Eaton v. Straw*, 18 N. H. 320; *Goddard v. Goddard*, 10 Penna. St. 79.

executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining *before* the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise or other executory limitation."

But suppose that A (in the case already put) survives the testator, and afterwards dies leaving several children, some of whom have already attained the prescribed age, and others not. Here the rule before the act was, (*m*) that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age. Now what happens in such a case is this: either the contingent remainder in the entirety vests in the child who first attains the age in the lifetime of A, with a liability to open and let in such others as afterwards attain the age in A's lifetime—*and this is the commonly received opinion; (*n*) or, at latest, the entirety vests, *eo instanti* that the particular estate determines, in all those children who have then attained the age, to the exclusion of those who have not. In either case the particular estate does not determine *before* the contingent remainder vests, and thus the event in which alone the act operates has not happened.

It has been suggested that as every infant child *in esse* during the particular estate might by possibility have become entitled to a share by attaining twenty-one during the continuance of the particular estate, such share was a contingent remainder at the time of the determination of the estate, and is consequently saved by the act. But this view seems inconsistent with the nature of a gift to a class: since, under such a gift, *those only are objects of the gift* who have attained the required qualification when the time for ascertaining the class arrives—viz. (in the present case) the determination of the particular estate,—and they take the whole.]

Where the limitation of a future interest, by way of executory devise, is followed by other limitations expectant thereon, in the nature of remainders, (which, of course, can only happen where the first executory estate is less than the

Nature of limitation possibly dependent even on subsequent events.

(*m*) *Ante* p. *264.

555. And see *Solicitors' Journ.* 1878, pp.

[(*n*) *Fea. C. R.* 312; *Mogg v. Mogg*, 1

544, 563, 601, 622, 640, 661.]

Mer. 654; 1 *Preston Conv.* 52, 53, 3 *Id.*

fee simple,) such subsequent limitations may, it is evident, according to events happening as well after as before the death of the testator, take effect either as remainders or as executory devises. If, by the removal out of the way of the preceding limitation or limitations, by the death of the object or objects, or otherwise, before the happening of the contingency on which the whole line of limitations depends, a subsequent devisee is placed at the head of the train; his estate will, on the happening of such contingency, take effect as an executory devise, though had it retained its original position, such estate would have vested as a remainder.

Thus, in *Doe d. Fonnercau v. Fonnereau*, (o) where A devised to the heirs male of the body of T., his eldest son, (who had an estate for life by deed,) and in default of such issue to his (testator's) second, third, fourth, and fifth sons successively, in tail male; it was held, that, if T. died leaving an heir male of his body, the limitation to A's next son took effect as a remainder expectant on the estate tail of such heir male; and that if he died leaving no male issue who survived the testator, it took effect immediately as an executory devise.

*Sometimes a limitation is so framed, as to take effect as a contingent remainder in fee in one event, and as an executory limitation engrafted on an alternative contingent remainder in fee in another event. Thus, in *Doe d. Herbert v. Selby*, (p) where the devise was to A for life, and after his decease to his children in fee as tenants in common; and if A should die without issue, or leaving such issue and such child or children should die under twenty-one or (which was read *and*) (q) without issue, then over to B in fee. A suffered a common recovery, and *died without issue*; and it was held that, in the event which had happened, the limitation to B would have taken effect as a contingent remainder, and consequently was destroyed by the recovery.

It is not quite accurate to say in such a case as *Doe v. Selby*, that the limitation is a contingent remainder in one event, and an executory devise in the other. There were, in fact, two alternative contingent remainders in fee: one of which was subject to an executory limitation in favor of the same person, who would have been the object of the alternative remainder. Such a case is

(o) Doug. 487; [*Hopkins v. Hopkins*, Fea. C. R. 510.]

(q) *Ante* p. *505; [and see *Doe d. Evers v. Challis*, 18 Q. B. 244.

(p) 4 D. & Ry. 608, 2 B. & Cr. 926.

clearly distinguishable from that of a devise to A for life; and if he shall die on the 1st of January, then, from one year afterwards, to B in fee; but if A shall die on any other day, then, immediately from the decease of A, to B in fee. In the first event, the limitation to B would take effect as an executory devise; and in the second, as a remainder: so that his interest would be destructible or not by the act of A, according to the event.

[Again in *Doe d. Harris v. Howell*, (*r*) where a testator devised real estates to his daughter for life, remainder to her son J. in fee; but in case J. should die before her, and she should have no other child living at her death, then as she should appoint. The daughter and her son both survived the testator, and then the son died before his mother, who afterwards had another son who survived her. It was decided that though the limitation, (which, for argument's sake, was supplied by implication,) (*s*) to the children of the daughter other than J. could operate only as an executory devise at the time of the testator's death, yet that by J.'s death in his mother's lifetime that limitation was converted into a remainder, and was barred by a fine which had been levied by her.

Executory devise may be changed into a remainder by events subsequent to testator's death.

*But a limitation which has once operated as a contingent remainder can never, after the death of the testator, be changed into an executory devise.] (*t*)

But not a remainder into an executory devise.

If, in *Doe v. Selby*, the tenant for life had had children, *i. e.*, born after the recovery, who had died under twenty-one, and without issue, the case would have raised a question, not, I think, hitherto decided, namely, whether an executory engrafted on a contingent remainder in fee, is involved in the destruction of such remainder. If an executory devise were derived out of the estate in defeasance of which it is limited to take effect, it is clear that, in such a case, it would be held to share the fate of the parent limitation, out of which it is to spring, and to all the accidents of which it would seem, therefore, to be necessarily subject. *Accessorium sequitur naturam sui principalis.* (*u*) It would then present an exception to Mr. Fearne's position, that "an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate *out of which*, or after which, it is limited;" (*x*) (to which, indeed,

Whether executory limitation to arise out of a contingent remainder is involved in its destruction.

(*r*) 10 B. & Cr. 191.

(*s*) But see *ante* p. *561.

(*t*) 2 Prest. Abst. 172; *Hopkins v.*

Mer. 703, 704, *arg.*, and the decree as to the High Littleton estate.]

(*u*) 3 Inst. 139.

Hopkins, 1 Atk. 581; *Mogg v. Mogg*, 1

(*x*) Fea. C. R. 418.

the case of an executory devise, *being preceded by an estate tail, does* [as he remarks himself] clearly form an exception.) (y) But it is conceived, that the notion above suggested, though seemingly countenanced by the terms of this position, is not correct in point of law. An executory devise is not derived out of, or dependent upon, the estate which it supersedes. It is a future substantive, independent, limitation to arise on a given event; and the circumstance, that that event involves the failure of the objects of a preceding estate, is merely accidental. (z)

Here it may be observed, that where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not concurrent. Thus, in *Goodtitle d. Vincent v. White*, (a) where a testator devised all his estate to his wife, in case his daughter (who became his heir) died under the age of twenty-one years. The wife died intestate; so that the daughter to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her *mother, to the executory interest so created. The daughter died a minor, upon which the heir *ex parte materna* claimed the property under the executory limitation, which claim was resisted by the heir *ex parte paterna*, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled. (b)

An immediate estate in fee, defeasible on the taking effect of an executory limitation, has generally all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject only to a possibility. ⁵ Therefore, in *Buckworth v. Thirkell*, (c) where a tes-

Curtsey attaches to a defeasible fee.

(y) See *ante* p. *254; [Fea. C. R. 423, 424.

(z) Cf. *Vincent Lee's Case*, Moor 269.]

(a) 15 East 174; *Same v. Same*, 2 B. & P. (N. R.) 383. See also *Goodright d. Larmer v. Searle*, 2 Wils. 29; *Doe d. Andrew v. Hutton*, 3 B. & P. 643.

(b) The arguments in this case are replete with instructive learning.

5. An interest in an executory devise

before possession may be conveyed or devised or descend to the devisee's heirs, *Doe v. Roe*, 2 Harring. 103.

(c) 1 Collect. Jur. 332, 3 B. & P. 652, n. [The same rule exists with regard to dower out of an estate tail, after failure of issue. *Secus* of an estate determined by condition at common law, *Payne v. Samms*, 1 Leo. 167, Goulds. 81; *Paine's Case*, 8 Rep. 34, 5 Vin. 315.

tator devised lands to trustees and their heirs, in trust for his granddaughter M. until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M., and her heirs and assigns, forever; but in case M. should die before the age of twenty-one years, and without leaving lawful issue of her body, then over. M. died under age, without issue living at her decease, *but having had a child born alive*; and it was held, that the husband (the father of such child) was entitled to an estate for life as tenant by the curtesy.

[But an exception exists where the prior estate is determined by executory devise over in case of the birth or existence of children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favor of the children themselves does not alter the case, since they would not, nor ever could, take by inheritance, but by purchase. (d)]

Unless estate be such as issue could in no case have inherited.

The general right to dower in similar cases is equally well established, (e) and the same exception must exist here as in regard to curtesy; it being equally necessary in support of either claim that children of the marriage, if any such there be, may by possibility inherit.] (f)

Same rule as to dower.

*No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory. (g)⁶ An

Executory bequest.

(d) *Sumner v. Partridge*, 2 Atk. 47; *Barker v. Barker*, 2 Sim. 249.

(e) *Moody v. King*, 2 Bing. 447; *Goodenough v. Goodenough* 3 Prest. Abs. 372; *Smith v. Spencer*, 2 Jur. (N. S.) 778.

(f) Litt., § 53.]

(g) Fea. C. R. 402.

6. A remainder or executory devise may be limited in a chattel, *Hudson v. Wadsworth*, 8 Conn. 348; *Scott v. Price*, 2 Serg. & R. 59; *Merrill v. Emery*, 10 Pick. 507; *Field v. Hitchcock*, 17 Pick. 182; *Westcott v. Cady*, 5 Johns. Ch. 334; *Rathbone v. Dyckman*, 3 Paige 8; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Henderson v. Vaulx*, 10 Yerg. 30; *Thornton v. Burch*, 20 Ga. 791; *Jones v. Sothoron*, 10 Gill & J. 187; *Powell v. Brown*,

1 *Bailey* 100; *Cudworth v. Hall*, 3 De-saus. 256; *Mazyck v. Vanderhorst*, *Bailey Eq.* 48; *Buist v. Dawes*, 4 *Strobh. Eq.* 37; *Geiger v. Brown*, 4 *McCord* 427; *Royall v. Eppes*, 2 *Munf.* 479; *Edelen v. Middleton*, 9 *Gill* 161; *Siegwald v. Siegwald*, 37 *Ill.* 430; but not by deed, *Morrow v. Williams*, 3 *Dev. L.* 263; nor in property that must perish with the using, *Westcott v. Cady*, *ubi supra*.

A limitation after a life estate may take effect as a vested remainder in the real property and an executory devise of the personalty, *Nash v. Cutler*, 16 *Pick.* 491. And the court may require security of the first taker for the protection of those entitled in remainder, *Hudson v. Wadsworth*, *ubi supra*; *Langworthy v. Chadwick*, 13 *Conn.* 42; *Patterson v.*

ulterior bequest of a term for years, after a prior limitation for life, owes its validity to this doctrine; the rule formerly being that, in such a case, the whole interest vested indefeasibly in the first legatee. (*h*)

Thus, in *Manning's Case*, (*i*) where a man possessed of a term of years, devised it to B, after the death of A, the testator's wife, and directed that, in the meantime, she should have the use and occupation during her life: it was contended, that the devise to A during her life gave her the whole term, and that, therefore, the devise over was void; but after much argument, three judges held that B took not by way of remainder, but by way of executory devise. And it was ruled that there was no difference between a gift of the land itself, and of the use or occupation or profits of the land.

Both courts of law and courts of equity have been constantly in the habit of entertaining suits, at the instance of an executory legatee, for the recovery of chattels, real as well as personal, and the latter, of

Devlin, 1 McMullen 459; *Homer v. Shelton*, 2 Metc. 194; *Westcott v. Cady*, *ubi supra*; *Covenhoven v. Shuler*, 2 Paige 122; *Clark v. Clark*, 8 Paige 152; *De Peyster v. Clendining*, 8 Paige 294; *Eichelberger v. Barnitz*, *ubi supra*; *Osborn v. Bank*, 9 Wheat. 738; *Henderson v. Vaulx*, *ubi supra*. But not without a showing to the court that there is danger of their being deprived of their estate in remainder by some act of the tenant for life, *Sutton v. Craddock*, 1 Ired. Eq. 134; *Gardner v. Harden*, 2 McCord Ch. 32; *Mortimer v. Moffatt*, 4 Hen. & Munf. 503. Nor will this be done where only "what may be then left," at the life-tenant's death, is given over, *German v. German*, 27 Penna. St. 116.

In executory devises of chattels, as a general rule, the court will lay hold of any words in a will to confine the expression "dying without issue" to dying without issue living at the time of the person's decease, *Cudworth v. Hall*, 3 Desaus. 256, 258; *Mazyck v. Vanderhorst*, Bailey Eq. 48; *Brummet v. Barber*, 2 Hill (S. C.) 543; *Briscoe v. Briscoe*, 6 Gill & J., 232; *Edelen v. Middleton*, 9 Gill 161; *Newton v. Griffith*, 1 Harr. & G. 111; *Dallam v. Dallam*, 7

Harr. & J. 220; *Dashiell v. Dashiell*, 2 Harr. & G. 127. But where a chattel is so given it manifests the intention of the donor to part with his whole interest, therefore the chattel will not revert to him, though the donee die without issue in his own lifetime, *Powell v. Brown*, 1 Bailey 100. But where given for life, without any further disposition, it will revert on the death of the life tenant, *Geiger v. Brown*, 4 McCord 427. Where the limitation over is either originally void, or cannot vest when the contingency happens, the entire interest will vest in the first taker, *Powell v. Brown*, *ubi supra*.

(*h*) *Horton v. Horton*, Cro. Jac. 74; *Woodcock v. Woodcock*, Cro. El. 795.

(*i*) 8 Rep. 95. See also *Doswell v. Earle*, 12 Ves. 473; *Theobalds v. Duffoy*, 9 Mod. 101; *Mallett v. Sackford*, 8 Vin. Ab. 89, pl. 5. See also *Lampett's Case*, 10 Rep. 47; *Catchmay v. Nicholas*, Finch 116; *Roe d. Bendale v. Summerset*, 5 Burr. 2608. That personalty may be subjected to the same modifications of ownership, by way of executory gifts, as land, see *Martin v. Long*, 2 Vern. 151; *Johnson v. Castle*, Winch 116, 8 Vin. Ab. 104, pl. 2.

pecuniary legacies, after a prior disposition for life or other partial interest.

In *Hoare v. Parker*, (*k*) an ulterior legatee recovered, by action of trover, certain chattels which the legatee *cestui que trust* Successive interests in personal chattels. for life, since dead, had pledged to a pawnbroker, who had given a valuable consideration without notice; the rule being, that the property does not, unless sold in market overt, follow the possession of chattels capable of being identified. (*l*)

Courts of equity, too, will enforce the actual delivery of specific chattels, which are of such a nature as that the loss cannot be compensated in damages; the value arising from considerations personal to the owner, as plate bearing family inscriptions, &c. (*m*) They will also, during the continuance of the prior interest, protect the rights of the ulterior legatee; but this protection is now confined to compelling the legatee for life *to give an inventory; which, as observed by Lord Thurlow, is more equal justice than requiring security, which was the old rule; as there ought to be dangee to require that. (*n*) Equitable remedy for their protection and recovery;

Where the legal title is in trustees, [the creditors of the person beneficially entitled for life cannot seize the chattels even in case of bankruptcy;] (*o*) and if they have been taken in execution, the trustees may maintain trover for them. (*p*) —against bankruptcy. When trover will lie.

But where the first taker was clothed with the legal title, and his creditor had taken the chattels (which consisted of plate) in execution; on a bill by the legatee calling for their restoration to the house with which they were bequeathed, and for security and an inventory, Lord Thurlow felt much difficulty. On the one hand, if the court could take away the articles, it was entitling the ulterior legatee to take from him the use, contrary to the testator's intention; and, on the other, if the creditors obtained the plate, they must succeed in applying it differently from the testator's intention; and there was a strong principle of justice for preserving the goods for the benefit of the person entitled,

(*k*) 2 T. R. 376.

ther, 13 Ves. 94; *Earl of Macclesfield v. Davis*, 3 Ves. & B. 16.

(*l*) See *Hartop v. Hoare*, 3 Atk. 44.

(*n*) 1 B. C. C. 279.

(*m*) *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. W. 389; *Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Lowther v. Low-*

[(*o*) *Earl of Shaftesbury v. Russell*, 1 B. & Cr. 666.]

(*p*) *Cadogan v. Kennett*, Cowp. 432.

if the court could so secure them. The point, however, was not decided, the case being disposed of on another ground. (*q*)

It is clear, at all events, that the ulterior legatee might, on his interest falling into possession, have maintained an action of trover for the plate in question; or, if incapable of being compensated in damages, a suit in equity for its delivery. These cases suggest, that, wherever temporary interests are created in chattels personal, the whole legal property should be vested in trustees.

As personal property of this nature is thus preserved through any number of successive takers, for the benefit of the person entitled to the ulterior and absolute interest, it is evident that bequests of such property are within the dangers of, and are consequently subject to, the rule directed against perpetuities. (*r*)

[But there can be no limitations of things the proper use of which lies in their consumption: under a specific (*s*) gift of such consumable articles cannot be limited. things for life or other limited interest the first taker gets the absolute property. (*t*) This rule, however, is not generally *applicable to such things where they are the testator's stock in trade, (*u*) or where personal use by the tenant for life was contemplated.] (*x*)

(*q*) *Foley v. Burnell*, 1 B. C. C. 274.

(*r*) *Vide ante* p. *250.

[(*s*) If included in a residuary bequest they would of course be sold, and the interest of the proceeds enjoyed by the tenant for life, 3 Mer. 195.

(*t*) *Randall v. Russell*, 3 Mer. 194; *Andrew v. Andrew*, 1 Coll. 690; *Twinning v. Powell*, 2 Id. 262. This was formerly doubted; see *Porter v. Tournay*, 3 Ves. 314.

(*u*) *Phillips v. Beal*, 32 Beav. 25 (wine); *Groves v. Wright*, 2 K. & J.

347 (farming); *Cockayne v. Harrison*, L. R., 13 Eq. 432 (farming.) But in *Breton v. Mockett*, 9 Ch. D. 95, the tenant for life, being expressly exempted from liability on account of diminution, was held to be absolutely entitled; and as to hay, roots and cattle on a stock-feeding farm, see *Bryant v. Easterson*, 5 Jur. (N. S.) 166.

(*x*) In *re Hall's Will*, 1 Jur. (N. S.) 974 (bequest of testator's wearing apparel to his widow for life.)]

* CHAPTER XXVII.

CONDITIONS.

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| <p>I. <i>Conditions, whether precedent or subsequent.—Consequences of this Distinction.</i></p> <p>II. <i>Conditions void for Repugnancy, and herein as to Provisions restrictive of Alienation, to defeat an Estate on Bankruptcy, &c.</i></p> | <p>III. <i>Conditions in restraint of Marriage; and as to such Conditions being in terrorem only.—What amounts to a Performance of Conditions requiring Consent, &c.</i></p> <p>IV. <i>Condition as to changing or assuming a Name, disputing a Will, &c.</i></p> |
|---|---|

I.—No precise form of words is necessary, in order to create conditions in wills; ¹ any expression disclosing the intention will have that effect. Thus a devise to A, “he pay- Conditions,
how created.

1. Wms. Ex'rs (6th Am. ed.) 1357; Wheeler v. Walker, 2 Conn. 196; Worman v. Teagarden, 2 Ohio 380; Brown v. Concord, 33 N. H. 285; Lindsey v. Lindsey, 45 Ind. 552.

And in a gift by will to an executor or trustee *eo nomine*, his qualifying and acting as such has been construed to be a condition precedent to the gift—implied, if not expressed, Billingslea v. Moore, 14 Ga. 370; Kirkland v. Narramore, 105 Mass. 31; 1 Roper on Leg. 777; Wms. Ex'rs (6th Am. ed.) 1391-6; Rothmahler v. Cohen, 4 Desaus. 215; and more especially so where the gift is made expressly “for care and trouble in executing that office,” Morris v. Kent, 2 Edw. Ch. 174. And to the same effect are the following English cases: Angermann v. Ford, 29 Beav. 349 (1860), in which case the executor became entitled by subsequently proving the will; Hawkins' Trust, 33 Beav. 570 (1864), in which case the executor, having been prevented by sickness from proving the will or acting, was held not to be entitled to a legacy given

“for his trouble;” Slaney v. Watney, 2 L. R., Eq. 418 (1866), there being a devise “to my friends” A, B and C, in trust, and a legacy to A, B and C, my executors hereinafter named; Lewis v. Matthews, 8 L. R., Eq. 277 (1869), in which case the executor named as legatee being in Australia, and sending a power of attorney to administer affairs of estate, but dying before he had proved the will, was held to have entitled himself to the legacy by sufficiently showing his intention to prove the will, Malins, V. C., saying, “As a general rule there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will. But I take it to be equally clear that Harrison v. Rowley, 4 Ves. 212, is still law, and that it is not absolutely necessary to prove a will in order to entitle a person to a legacy as executor.” In the case of Jewis v. Lawrence, however, 8 L. R., Eq. 349 (1869), where a leasehold property was bequeathed to A, and a legacy of £100 given to B, each being described as “one

of my trustees and executors," the inequality of the gifts was held to rebut the presumption of such a condition, and B having died before proof of the will, his representatives were held to be entitled to the legacy. In *re Denby*, 3 De G., F. & J. 350 (1861), however, a legacy to "my friend A, of M., banker's clerk, and one of the executors of this my will," was held not to be conditional on acceptance; so in *Bubb v. Yelverton*, 13 L. R., Eq. 131 (1868), a gift to his "friend" A (executor) "as a remembrance," was held to be unconditional; so in *Brand v. Chad-dock*, 19 W. R. 378, 24 L. T. R. (N. S., 1871,) 347, legacies to executors A and B and niece C, A being also made guardian of testator's daughter, with provision for her visiting at his house; see also *Matter of Reeve*, 46 L. J., Ch. Div. 412, 36 L. T. R. (N. S., 1877,) 906, where Sir George Jessel, M. R., says, "It appears to me that the presumption of its having been given to him as executor is rebutted by its only having been given to him *after the death of the tenant for life*."

In a grant to A and B, "commissioners to locate a seat of justice for the county of Y.," these words have been held not to constitute a condition, *Gadberry v. Sheppard*, 27 Miss. 203.

The following also have been held not to be conditions: A devise to a town "for the use and support of a minister," *Brown v. Concord*, 33 N. H. 285; a devise of slaves to son, with these words, "it is my desire that he remove back to this country, but not to take them to any other part of the country," *Harris v. Hearne*, 1 Winst. Eq. 92; a stipulation in a deed to erect and perpetually maintain a division fence, *Parish v. Whitney*, 3 Gray 516; a promise by a corporation not to set up a claim against vendor of stock, though the promise formed part consideration of the sale, *Jackson v. Grant*, 3 C. E. Gr. (N. J.) 145; a grant to a town in fee—reciting legislative authority for the grant, "for the purpose of erecting a pest-house"

upon the land—*hab. for the use aforesaid*, *Ward v. N. Eng. Screw Co.*, 1 Cliff. (U. S.) C. C. 565. And so, in general, such expressions as "in case of a sudden and unexpected death, &c., I give," *Skipwith v. Cabell*, 19 Gratt. 758.

But in *Thomas v. Howell*, 43 L. J. R., Ch. 511 (1874), a condition was made of the words "presuming and believing that the rental of my estate will produce £16,000, I give £4000 more," &c., which not being the case defeated the gift. So legacies charged upon an estate devised to testator's eldest son, "not to be paid until he shall come into possession of the M. estate," in which he had remainder after a pending life estate, was held to be upon condition, and failed by the death of A before the termination of the life estate, and before he came into possession of the M. estate, *Taylor v. Lambert*, 45 L. J. R., Ch. 418 (1876). In *Edgeworth v. Edgeworth*, 4 L. R., H. L. 35 (1869), a remainder to A for life, and "in case he should come to the possession of the estate limited to him, and should die leaving issue," to such issue, was held not to be a gift upon condition, and notwithstanding A's death before possession, and before the determination of the particular estate, his issue took. So in *Yates v. University College*, 7 L. R., H. L. 438 (1875), affirming 8 Ch. App., L. R. 454, a bequest to a college for a professorship for which the testator "purposed to prepare rules," &c., was not upon condition, and was upheld notwithstanding the death of testator before he had prepared any rules, &c.

"Where words of condition are used in connection with a devise, and there is another or subsequent devise of the same premises, on the failure of the first or preceding devise, the words of condition are not strictly considered as such, or rather have not the force and effect of *condition*, and are called words of *limitation*," *Ewing, C. J.*, in *Den v. Hance*, 6 Halst. 244. In this case a devise over in case the first devisee should refuse to execute a certain

ing,"² or "he to pay £500 within one month after my decease," would be a condition, (a) for breach of which the heir might enter: (b) *unless

deed and release, was held to be a *limitation* taking immediate effect on the refusal. If the condition subsequent be followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, that is termed a *conditional limitation*. Words of *limitation* mark the period which is to determine the estate, but words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation," 4 Kent Com. 121; Fearn on Rem. 10; 2 Redf. on Wills 296; 2 Washburn on Real Prop. 21; Taylor v. Wendel, 4 Bradf. 324; Flood on Wills 448. In this latter work the distinction in creating words also is noted thus: "The use of the following words in a will or deed make a *condition*: *upon condition*; *provided always*; *so that*; *that if it happen*; and the following words, if used in a will, will create a condition though not if they occurred in a deed: *that he shall do*; *on his doing*; *with that intention*;

to the effect; *for the purpose*. Proper words of *limitation* are: *while*; *so long as*; *until*; *provided that*; *so that*; *as long as*; *wheresoever*; *as far as*; *up to*; *so long*. We thus see that while *acts* generally form the essence of a condition, *time* generally forms that of a limitation." In Fox v. Phelps, 20 Wend. 437, Chancellor Walworth makes this distinction: "Where there is a devise upon a condition, and the estate is devised over to a stranger upon the breach or non-performance of the condition, that *condition* is usually construed to be a *limitation*." See also 1 Rep. on Leg. 750; Newell v. Nichols, 75 N. Y. 78.

2. The payment of a debt or legacy, or the support and maintenance of some person, is the frequent subject matter of a condition to be performed by the legatee or devisee. These provisions have been variously construed and enforced in the United States: as a personal charge and liability thrown upon the legatee or devisee, as a charge upon the land or thing devised, and finally as a condition, by non-performance of which the estate of the legatee or devisee is divested; the

(a) 1 Co Lit. 236 b.

(b) But as to the equitable relief afforded in such cases, see Hayes v. Hayes, Finch 231, and cases cited and commented on, Hayes & Jarm. Conc. Wills (3d ed.) 398, [8th ed. 407; and to the cases there cited, add Paine v. Hyde, 4 Beav. 468; Hawkes v. Baldwin, 9 Sim. 355; Steuart v. Frankland, 16 Jur. 738; In re Hodges' Legacy, L. R., 16 Eq. 92. But what was once deemed a devise upon condition would now be generally construed a devise in fee upon trust, and instead of the heir entering for condition broken, the *cestui que trust* could enforce the trust, Sug. Pow. 106 (8th ed.); Wright v. Wilkins, 2 B. & S. 232. A condition annexed to a legacy may be enforced in like man-

ner, Rees v. Engelback, L. R., 12 Eq. 225; Middleton v. Windross, L. R., 16 Eq. 212. In In re Wellstead, 25 Beav. 612, a bequest towards the endowment of a church, in consideration of which testator's nephew and his heirs were to nominate every third incumbent, was held not a condition, but a purchase of the right; and the bishop declining to concede the right, the legacy failed. But if a legacy be to A on condition that he convey a particular estate to B, and A conveys accordingly, the analogy of purchase will not extend to give him a lien on the estate for his legacy, this being due from the executor, Barker v. Barker, L. R., 10 Eq. 438.]

the property were given over in default by way of executory devise. (c)

last of these constructions appearing to have been adopted by the courts only as a last resort. In all cases where payment is to be made or support to be provided by the legatee or devisee, whether it be made expressly a *condition* of the gift or not, the acceptance of the gift creates a personal liability for the payment, support, &c., which will be enforced both by courts of law and of equity. Thus, in *Fox v. Phelps*, 17 Wend. 393, the will "required" the devisee to pay a certain legacy. This was held not to be a *condition*, but a *personal charge* upon the devisee, and enforceable as an equitable mortgage against the land devised. In *Gridley v. Gridley*, 24 N. Y. 130; *Spraker v. Van Alstine*, 18 Wend. 200; *Mahar v. O'Hara*, 4 Gilm. 424; *Sands v. Champ- lin*, 1 Story C. C. 376, a direction of the testator that the devisee should pay a debt or legacy was enforced against the devisee as a personal liability arising from acceptance of the devise; and in *Lord v. Lord*, 22 Conn. 575, a legacy, with direction that legatee pay debts, drew after it the same liability. In the following cases the like liability was implied and enforced from gift "upon condition" that donee pay: *Horning v. Wiederspallen*, 1 Stew. (N. J.) 387; *Wheeler v. Lester*, 1 Bradf. 293; *Sanders v. Sanders*, 3 Bibb 286. In *Birdsall v. Hewlett*, 1 Paige 32, a devise, "provided" devisee paid certain legacies, was construed to be a condition with a charge of the legacies upon the land devised, and a personal liability of the devisee if he accepted the devise; see also *Sheldon v. Purple*, 15 Pick. 528, where the testator's whole estate was devised to A, and he "required" that B be supported out of his estate. In *Pickering v. Pickering*, 6 N. H. 120, a legacy charged upon land was enforced by action

against the devisee of the land personally. But a devise to A, "provided he pay" a certain legacy, has been held not to be a *condition* but a *charge upon the land*, in *Woods v. Woods*, Busb. L. 290; *Hanna's Appeal*, 31 Penna. St. 53; see, too, *Patterson v. Patterson*, 63 N. C. 322. So a devise to A, "he paying" certain legacies, *Tower's Appropriation*, 9 Watts & S. 103; *Lockett v. White*, 10 Gill & J. 480; or "by his paying out of my estate" certain legacies, *Taft v. Morse*, 4 Metc. 523; see also 12 Wheat. 498, and *Gardner v. Gardner*, 3 Mass. 178. So a devise to A, "provided" he should provide a home for his sister, with no limitation over on breach, *Woodward v. Walling*, 31 Iowa 533; *Meakin v. Duvall*, 43 Md. 372; or with the support of testator's daughter charged on the devise, *Veazey v. Whitehouse*, 19 N. H. 409. So a legacy with direction that the legatee maintain the testator during his life, *Colwell v. Alger*, 5 Gray 67; see also 2 Redf. on Wills 300. In *Rhett v. Mason*, 18 Gratt. 541, however, a devise to testator's wife "for her maintenance and support and for the maintenance and support of our children," was held to constitute neither a charge nor a trust for the children; while in *Jennings v. Jennings*, 27 Ill. 518, a devise to sons, if they support their mother, with right to immediate possession "if they comply with these conditions," was construed to be both a condition subsequent and a charge on the land. And a devise of land to five persons for the maintenance and support of them all, the same to be divided when the youngest came of age, was held not to create a charge for the maintenance of one upon the undivided shares of the others, *Crandall v. Hoysradt*, 1 Sandf. Ch. 40.

In the following cases the words in the

(c) See ch. XXVI.

Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to *determine* an estate antecedently vested. But though the distinction between these two classes of cases is sufficiently obvious in its consequences; yet it is often difficult, from the ambiguity and vagueness of the language of the will, to ascertain whether the one or the other is in the testator's contemplation; *i. e.*, whether he intend that a compliance with the requisition which he has chosen to annex to the enjoyment of his bounty shall be a condition of its *acquisition*, or merely of its *retention*. Conditions precedent and subsequent.

will requiring *payment, support, maintenance, &c.*, by the donee, have been held to create a *condition*:

1st. *Condition precedent*.—Devise to A “on payment” by him of a certain legacy, *West v. Biscoe*, 6 Harr. & J. 468; “he paying,” *Bradstreet v. Clark*, 21 Pick. 389; legacy to A “on condition” of payment, *Beall v. Deale*, 7 Gill & J. 216; “if he first execute mortgage to secure legacies,” *Laurens v. Lucas*, 6 Rich. Eq. 217; so an annuity to A “to bring up B to whose care I commit her and at the child's death to the said A,” *Pitt v. Pitt*, 26 L. T. R. (N. S., 1872), 827.

2d. *Condition subsequent*.—Devise to A “on condition” that he pay legacy within one year, *Wheeler v. Walker*, 2 Conn. 196; see, too, *Platt v. Platt*, 42 Conn. 330; or that he pay debts and legacies, *Horsey v. Horsey*, 4 Harring. 517; grant on condition that grantee pay off a mortgage on the land, *Ross v. Tremaine*, 2 Metc. 495; devise to A “provided that” he pay a certain sum to executor, *Downer v. Downer*, 9 Watts 60; or “if A will not consent to pay ground rent,” then that the devise should be void and the property return to testator's estate, *Kennedy's Appeal*, 60 Penna. St. 515; or on condition that donee maintain, support or provide for some third person, *Stark v. Smiley*, 25 Me. 201 (although the devise concluded in that case with the words “therefore as soon as he shall have paid * * * he shall be entitled to all my real estate”);

Marwick v. Andrews, 25 Me. 525; *Thomas v. Record*, 47 Me. 500 (condition in deed to maintain grantor); *Smith v. Jewett*, 40 N. H. 530; *Simonds v. Simonds*, 3 Metc. 562; *Clapp v. Clapp*, 6 R. I. 129; *Judd v. Bushnell*, 7 Conn. 211; *Creswell v. Lawson*, 7 Gill & J. 240; *Huckabee v. Swoop*, 20 Ala. 491; *Cross v. Carson*, 8 Blackf. 138; *Stone v. Hurford*, Id. 452; *Thorp v. Johnson*, 3 Ind. 343; *Petro v. Cassiday*, 13 Ind. 289; *Beck v. Montgomery*, 7 How. (Miss.) 39; or pay an appraised value, *Thomas v. Kelly*, 3 Rich. (N. S.) 210; “on his paying,” *Burnett v. Strong*, 26 Miss. 116; *Birdsall v. Hewlett*, 1 Paige 32, enforceable also as a personal liability, and in equity as a charge on the land; *Harris v. Fly*, 7 Paige 427; so, too, a devise to A “by his paying,” *Ward v. Ward*, 15 Pick. 511; so if devisee “comply with these conditions,” (to take care of mother,) *Jennings v. Jennings*, 27 Ill. 518. In *Dunbar v. Dunbar*, 3 Vt. 472, a legacy of all testator's personal property has been held to be on the implied condition that he pay testator's debts.

3. “Whether a condition is *subsequent* or *precedent* must depend on the language in which it is framed and very little help can be derived from decided cases on the point. It may however be noticed that when the condition requires something to be done which will take time, the argument is in favor of construing it as a *condition subsequent*. On the other hand a

As on questions of this nature general propositions afford but little assistance in dealing with particular cases of difficulty, (d) we shall proceed to the immediate consideration of the cases; adducing some instances, first, of conditions precedent; and, secondly, of conditions subsequent.

In an early case, (e) where a man devised a term to A if he lived to the age of twenty-five, and paid to his eldest brother a certain sum of money; it was agreed that no estate passed until that age and payment of the money.

So where (f) A charged his real estate with £500 to be paid to his sister H. within one month after her marriage, but so as she married with the approbation of his brother J., if living; and, in case she married without his consent, the £500 was not to be raised. H. married in the lifetime of J., and without his consent; and it was held that, this being a condition precedent, nothing vested.

condition which involves anything in the nature of consideration is in general a condition precedent," Theobald on Wills, p. 263. Chief Justice Marshall, in *Finlay v. King*, 3 Pet. 346, lays down the rule with his usual clearness and force in these words: "It is certainly well settled that there are no technical appropriate words, which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently and the question is always a question of intention. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent; and unless it be performed the devisee can take nothing. If on the contrary the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. * * * It is a general rule that a devise in words of the present time, as, 'I give to A my lands in B,' imports, if no contrary intent appears, an immediate interest, which

vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance." See also to the same effect, 4 Kent Com. 120; Flood on Wills 449; 2 Redf. on Wills 283; 2 Washb. on Real Prop. 8; Nicoll v. Erie Railway, 2 Kern. 121; Underhill v. Saratoga R. R., 20 Barb. 455; Barruso v. Madan, 2 Johns. 145; Parmelee v. O. & S. R. R., 2 Seld. 74; Tompkins v. Elliott, 5 Wend. 496; Robbins v. Gleason, 47 Me. 259; Burnett v. Strong, 26 Miss. 116; Ward v. N. Eng. Screw Co., 1 Cliff. C. C. 565; Cresswell v. Lawson, 7 Gill & J. 240; Stark v. Smiley, 25 Me. 201; Haydon v. Stoughton, 5 Pick. 528; Cheairs v. Smith, 37 Miss. 646; Jackson v. Kip, 3 Halst. 241; Bowman v. Long, 23 Ga. 247.

(d) But see some general rules laid down by Willes, C. J., in *Acherley v. Vernon*, Willes 153, *infra*.

(e) *Johnson v. Castle*, cit. Winch 116, 8 Vin. Ab. 104, pl. 2.

(f) *Reves v. Herne*, 5 Vin. Ab. 343, pl. 41.

Again, where (*g*) *V.* devised to his sister *A.* a rent-charge, to be paid half-yearly out of the rents of his real estate, during her life; and, by a codicil, declared that what he had given to her should be accepted in satisfaction of all she might claim out of his real or personal estate, and upon condition that she released all her right or claim thereto to his executors. The court held it was a condition precedent, and that an action, which the husband as administrator had brought for the arrears, could not be sustained. Willes, C. J., observed that no words *necessarily made a condition precedent; but the same words would make a condition either precedent or subsequent, according to the nature of the thing and the intent of the parties. If, therefore, a man devised one thing in lieu or consideration of another, or agreed to do anything, or pay a sum of money in consideration of a thing to be done, in these cases that which was the consideration was looked upon as a condition precedent. There was (he said) no pretence for saying, in the present case, that the devisee could not perform the condition before the time of payment of the annuity; for the first payment was not to be until six months after the testator's decease, and she might as well release her right in six months, as at any future time. Besides, the penning of the clause afforded another very strong argument that this was intended to be a condition precedent; for all the words were in the present tense. The testator willed that this annuity be accepted in satisfaction and upon condition that "she release," which is just the same as if he had said, "I give her the annuity, she releasing," which expression had been always holden to make a condition precedent, as appeared from *Large v. Cheshire*, (*h*) where a man agreed to pay J. S. £50, he making plain a good estate in certain lands.⁴

Again, in *Randall v. Payne*, (*i*) where a testator, after giving certain

(*g*) *Acherley v. Vernon*, Willes 153. See also *Gillett v. Wray*, 1 P. W. 284; *Harvey v. Aston*, 1 Atk. 361, Com. Rep. 726.

(*h*) 1 Vent. 147.

4. In *Den v. Hance*, 6 Halst. 244, a devise to A "provided that he shall convey unto B [certain other property] and shall release to my executors all accounts, charges, &c., against me * * * and in case the said A shall refuse to make

such conveyance or to execute such releases," then over to B, was held to be a limitation dependent on a condition precedent, and A having died without executing the conveyance or release, his estate failed and the limitation over to B took effect. See also *Den, Cozens, v. Colson*, 2 Penn. (N. J.) 877; *Fredericks v. Gray*, 10 Serg. & R. 182; *Hyde v. Baldwin*, 17 Pick. 303.

(*i*) 1 B. C. C. 55.

Other cases of conditions precedent.

legacies to J. and M. added, "If either of these girls should marry into the families of G. or R., and have a son, I give all my estate to him for life (with remainder over); *and if they shall not marry,*" then he gave the same to other persons. Lord Thurlow held this to be a condition precedent; and that nothing vested in the devisees over while the performance of the condition by J. or M. was possible, which was during their whole lives; (*k*) and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands.

So in *Lester v. Garland*, (*l*) where L. by his will bequeathed the residue of his personal estate to trustees, upon trust that, in case his sister S. P. should not intermarry with A before all or any of the shares thereafter given to her children should become payable; and in case his sister should, within six calendar manths after his decease, give such security as his *trustees should approve of that she would not intermarry with A; or, in case she should so marry after all or any of the shares bequeathed to her children should be paid to him, her or them, that she would, within six calendar months after such marriage, pay the amount, or cause such child or children who should have received his, her, or their share or shares, to refund; *then and not otherwise*, the trustees were directed to pay such residuary estate to the eight children of S. P. at the age of twenty-one or marriage, with benefit of survivorship; and the testator provided, that in case his said sister should intermarry with A before all or any of the shares should be payable, or should refuse to give such security as aforesaid, then he directed £1000 apiece only to be paid to the children; and subject thereto, gave his residuary estate to the children of another

Computation of time.

sister. It was agreed that this was a condition precedent; and the only question was, whether the computation of the six months was *inclusive* or *exclusive* of the day of the testator's decease, he having died on the 12th of January, and the security

Period allowed for performing condition held to be exclusive of the day of testator's death.

having been given on the 12th of July. Sir W. Grant, M. R., considered that the reason of the thing required the exclusion of the day, as the legatee could not reasonably be supposed to have any opportunity of beginning, on

(*k*) As to this, see *Page v. Hayward*, 2 Manners, 5 B. & Ald. 917; [*Davis v. Salk*, 571, stated *infra*, p. *5; *Lowe v. Angel*, 4 D., F. & J. 524.]

(*l*) 15 Ves. 248.

the day of L.'s death, the deliberation which was to govern the election ultimately to be made. (m)

So in *Ellis v. Ellis*, (n) where a testator bequeathed to his granddaughter, "if she be unmarried, and does not marry without the consent of my trustees," the sum of £400; one moiety to be paid upon her marriage, if her marriage should be made with consent, and the other in one year afterwards; but if she were then married, or should marry without such consent, then the £400 to "sink in the personal fortune." Lord Redesdale was of opinion that marriage was a condition precedent, and that the legacy was wholly contingent until that event. 5

[(m) See also *Gorst v. Lowndes*, 11 Sim. 434.]

(n) 1 Sch. & Lef. 1. Cf. *Wheeler v. Bingham*, 3 Atk. 364. See further, as to conditions precedent, *Fry v. Porter*, 1 Ch. Cas. 138; *Semphill v. Bayly*, Pre. Ch. 562; *Pulling v. Reddy*, 1 Wils. 21; *Elton v. Elton*, Id. 159; *Garbut v. Hilton*, 1 Atk. 381; *Reynish v. Martin*, 3 Atk. 330; *Long v. Dennis*, 4 Burr. 2052; *Stackpole v. Beaumont*, 3 Ves. 89; [*Latimer's Case*, *Dyer* 596; *Atkins v. Hiccocks*, 1 Atk. 500; *Morgan v. Morgan*, 15 Jur. 319, 20 L. J., Ch. 109.]

5. To the above illustrations of a condition precedent may be added: A legacy to A and B, "provided that the legatees appear within six years with sufficient proof that they are my heirs, which I do require them to do before they get any part of my estate," *Campbell v. McDonald*, 10 Watts 179. A devise to A, "if he be living and return to the county of O.," *Reeves v. Craig*, 1 Winst. L. 209; or "upon condition that he remain with me and continue to conduct himself in a proper manner," *Den v. Messenger*, 4 Vr. 499; or upon condition of his good conduct until he be twenty-four years of age, *West v. Moore*, 37 Miss. 114; or on his arriving at the age of twenty-one, and assuming testator's name, *Drayton v. Grimke*, Rich. Eq. Cas. 321; a legacy to A—he to have privilege of remaining at home in pursuit of common business of family, and

"to receive as a compensation for his labor," *Mayall's Appeal*, 29 Me. 474; a devise to A, after his mother shall cease to be my widow, provided he shall live on the place and carry it on till that time in a workmanlike manner, *Marston v. Marston*, 47 Me. 495—a legacy to the church of B., "provided the Rev. D. C. continue to be their pastor for seven years to come"—if not, then to D. C., *Caw v. Robertson*, 5 N. Y. 125. A covenant by purchaser of a negro to free her, "if she serve ten years" without having children, *State v. Mount, Coxe* 292; or grant of liberty, reserving service of slave for grantor's life, *Isaac v. West*, 6 Rand. 652. A devise to A for life, and "if he should have heirs lawfully begotten," in fee, *Shriver v. Lynn*, 2 How. (U. S.) 43; or "if he shall again become compos mentis, or have lawful issue who shall be compos mentis," *Jackson v. Kip*, 3 Halst. 241. So in suit for legacy of negroes to A, "she to pick out fifteen of my best negroes and keep them"—the selection by A, *Vaughan v. Vaughan*, 30 Ala. 329. Where there was a direction that executors emancipate "such of my negroes as are willing to go to the State of Kentucky," "if any shall refuse to leave the State of Maryland," they to be sold, their leaving Maryland was held to be a condition precedent, *Maddox v. Negroes*, 17 Md. 413; but see *Spencer v. Negro Dennis*, 8 Gill 314, where "if they leave the state within thirty days after,"

One of the earliest examples of a condition subsequent in wills is afforded by *Woodcock v. Woodcock*, (o) where W. devised a leasehold house to J. for her life; and if she died before S. *then that S. should have it upon such reasonable composition as should be thought fit by his overseers (*i. e.*, his executors,) allowing to his other executors such reasonable rates as should be thought meet by his overseers. It was agreed by the court that this condition was subsequent, as the overseers might make agreement with him at any time.

So, in *Popham v. Bampffield*, (p) where one R. devised real estate to trustees for payment of debts, and, after his debts paid, then in trust for A and his heirs male; but declared that A should have no benefit of this devise, unless his father should settle upon him a certain estate; and in default thereof, or if A died without issue, then over. It was held, that this was a condition subsequent, and was performed by the father *devising* his estate to the son.

So, in *Peyton v. Bury*, (q) where one bequeathed the residue of his personal estate to S., provided she married with the consent of A and B, his executors in trust, and if S. should marry otherwise, he bequeathed the said residuum to W. A died; after which S. married without the consent of B. The M. R. observed, it was very clear that, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death, since both of the

was construed to be a condition subsequent. Statutory requirements in making claim to Indian lands are a condition precedent, *Van Horne v. Dorrance*, 2 Dall. 317. So a power to sell, "if income be not sufficient for support," *Minot v. Prescott*, 14 Mass. 495; or legacy to A for her support, "if she shall lose any part of her own property and need more" for her support, *Ely v. Ely*, 5 C. E. Gr. (N. J.) 43; or "when she should be sick and unable to support herself," *Reynolds v. Demarest*, 5 C. E. Gr. (N. J.) 218. And in general *performance* by the plaintiff is a condition precedent to the enforcement of an entire contract, *Erving v. Ingram*, 4 Zab. 520; *Huffman v. Hummer*, 3 C. E. Gr. (N. J.)

83; *Johnson v. Applegate*, Coxe 233; *Long v. Hartwell*, 5 Vr. 116; *Brown v. Fitch*, 4 Vr. 418; *Gardiner v. Corson*, 15 Mass. 500; *Wells v. Smith*, 2 Edw. Ch. 78; *Whitney v. Spencer*, 4 Cow. 39; *Johnson v. Reed*, 9 Mass. 78. It is a general rule that conditions precedent must be *strictly* performed, but equity often construes a *cy pres* performance to be sufficient as substantially executing the testator's intention, 1 Rop. on Leg. 767; Wms. Ex'rs (6th Am. ed.) 1376; 1 Story's Eq., § 291.

(o) Cro. El. 795.

(p) 1 Vern. 79, 1 Eq. Cas. Ab. 108, pl. 2.

(q) 2 P. W. 626. See also *Gulliver v. Ashby*, 4 Burr. 1929, stated *post* p. *8.

executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be (beneficially) in the executors, they being expressly mentioned to be but executors in trust. (r) Of this case [Sir W. Grant] observed, that the bequest over showed what the testator meant by making marriage with consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture. (s) The case seems somewhat analogous in principle to those (t) in which a devise or bequest, if the object shall attain a certain age, with a gift over in case he shall die under that age, has been held to be immediately vested.

Again, in *Page v. Hayward*, (u) where a testator devised lands to M. and the heirs male of her body, upon condition that she married and had issue male by a Searle; and, in default of both *conditions he devised the lands to E. in the same manner, with remainders over: it was held that M. and E. took estates tail, which did not determine by marrying another person, inasmuch as they might survive their first husband, and marry a Searle. In this case the limitation was, in effect, and seems to have been regarded by the court, as a devise in special tail to M. and E. successively, *i. e.*, to them, and the heirs male of their bodies, begotten by a Searle.

So, in *Aislabie v. Rice*, (x) where a testator devised certain lands and furniture to H. and her assigns for her life, in case she continued unmarried; and, after her decease, he devised the lands and furniture to such persons as she should by deed or will appoint, and, for want of appointment, then over; but in case H. should marry in the lifetime of the testator's wife, and with her consent, or, after her death, with the consent of A and B or the survivor, then H. should enjoy the lands and furniture in the same manner as she would have done if she had continued unmarried. The testator's wife and A and B all died; after which H. married. She and her husband sold the property in question; and the purchaser objecting to the title, Sir W. Grant, M. R., sent a case to the C. P., on the question as to what estate H. took under the will. The court certified that H. took an estate for life, with a power of appointment over the fee, subject, as to her life estate only, to the condition of her remaining sole and unmarried,

(r) Nor would the intermediate beneficial interest have belonged to them if they had not. It would have gone in augmentation of the contingently disposed-of residue.

[(s) *Knight v. Cameron*, 14 Ves. 392.]

(t) *Ante* p. *309.

(u) 2 Salk. 570.

(x) 3 Mad. 256.

which condition was qualified by the proviso, that a marriage with the consent of the persons mentioned should not determine her life estate: that the condition was a condition subsequent, and as the compliance with it was, by the deaths of those persons, become impossible by the act of God, her estate for life became absolute, (y) and she might execute the power. Sir J. Leach, V. C., in conformity to this certificate, decreed a specific performance of the contract. The court must, in this case, have considered the limitation as being, in effect, a devise of an entire estate for life, subject to the condition of marrying (if at all) with consent, which being rendered impracticable by the death of the persons whose consent was required, the estate became absolute; not (as the language would seem to imply) a devise of two distinct estates, the one to cease on marriage, under *any* circumstances, and the other to commence on marriage with consent.

Of course, where an interest is given to certain persons, with *a direction that, on a prescribed event, as their marriage without consent, it shall be forfeited, such a direction operates merely to divest, and not to prevent the vesting of the interest so given. (z) [So where a rent-charge was given to A for life, or as long as her conduct was discreet and approved by B, it was held, that the gift was vested and that the condition was subsequent. (a) And a condition may be subsequent though the estate or interest which it is to defeat is contingent, and can in no case vest before the condition takes effect; for a contingent gift or interest has an existence capable, as well as a vested interest or estate, of being made to cease and become void.] (b)

It would seem, from the preceding cases, that the argument in favor of the condition being precedent is stronger where a gross sum of money is to be raised out of land (c) than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue; (d) where the nature of the interest is such as to allow time

(y) As to this, see *infra* *10.

(z) Lloyd v. Branton, 3 Mer. 108.

[(a) Wynne v. Wynne, 2 M. & Gr. 8. See Webb v. Grace, 2 Phill. 701.

(b) Egerton v. Earl Brownlow, 4 H. L. Cas. 1. This case (which involved also a question of public policy) was decided by D. P., upon the advice of Lords Lyndhurst Brougham, Truro and St. Leonards, against the opinion of all but two of the judges, and overruling the decision of

Lord Cranworth, V. C., (1 Sim. (N. S.) 464,) who as L. C. retained his original opinion.]

(c) Indeed, such cases seem to fall *a fortiori* under the principle of the cases (referred to *ante* p. *834) in which such charges were held to fail, from the death of the devisee before the time of payment.

(d) Peyton v. Bury, 2 P. W. 626, *ante* p. *5.

for the performance of the act before its usufructuary enjoyment commences, than where not; (e) where the condition is capable of being performed *instantly*, than where time is requisite for the performance; (f) while, on the other hand, the circumstance of a definite time being appointed for the performance of the condition, but none for the vesting of the estate, favors the supposition of its being a condition subsequent. (g) ⁶

(e) *Acherley v. Vernon*, Willes 153.

(f) *Gulliver d. Corrie v. Ashby*, 4 Burr. 1940.

(g) *Thomas v. Howell*, 1 Salk. 170, as to which see *infra* *10: [and see per Lord Hardwicke, *Avelyn v. Ward*, 1 Ves. 422; *Walker v. Walker*, 2 D., F. & J. 255, 29 L. J., Ch. 856. See, however, *Roundell v. Curren*, 2 B. C. C. 67; *Robinson v. Wheelwright*, 6 D., M. & G. 535.]

6. Other illustrations of a condition subsequent are the following: A devise to a town "for the purpose of building a school-house" in a certain place, *Hayden v. Stoughton*, 5 Pick. 528; or "for the benefit of a public school," *Bell Co. v. Alexander*, 22 Tex. 350; or "to use and improve forever and I positively order that the same be not sold but be rented out and the rents appropriated toward the support of a gospel minister," *Brigham v. Shattuck*, 10 Pick. 305. So a legacy to a church "so long as they maintain their present essential doctrines and principles of faith and practice," *Princeton v. Adams*, 10 Cush. 129. So to a church committee, "provided they fence the land and keep the same in repair," *Hooper v. Cummings*, 45 Me. 359; or on condition that devisee "keep the house in repair," *Tilden v. Tilden*, 13 Gray 103; or in a deed a condition that the grantee build a railroad in a certain time, *Nicoll v. Erie Railway*, 2 Kern. 121; or a dam, *Underhill v. Saratoga R. R.*, 20 Barb. 455; or on condition that testator's daughter should have the use and occupation of a certain room, *Hogeboom v. Hall*, 24 Wend. 146; or "if B should never return," *Den v. Brown*, 2 Halst. 305; or a

condition in a deed that grantee should indemnify grantor, *Michigan Bank v. Hastings*, 1 Doug. (Mich.) 225; or for the payment of purchase money by the grantee, *Taylor v. Sutton*, 15 Ga. 103. So a condition that devisee pay testator's debts, *Martin v. Ballou*, 13 Barb. 119; *Howard v. Turner*, 6 Greenl. 106; or that devisee "educate and bring up [testator's] granddaughter," *Merrill v. Emery*, 10 Pick. 507; or support and maintain her, *Boone v. Tipton*, 15 Ind. 270; *Petro v. Cassiday*, 13 Ind. 289; *Rush v. Rush*, 40 Ind. 83; *Warwick v. Andrews*, 25 Me. 525; *Thomas v. Record*, 47 Me. 500; *Cross v. Carson*, 8 Blackf. 138; *Smith v. Jewett*, 40 N. H. 530; *Stone v. Hurford*, 8 Blackf. 452; *Huckabee v. Swoop*, 20 Ala. 491; or that devisee "remain on and take care of farm" and pay legacies, *Lindsey v. Lindsey*, 45 Ind. 552; or "settle and reside" on farm, *McLachlan v. McLachlan*, 9 Paige 534; or if legatee die leaving no children, *Hull v. Eddy*, 2 Gr. (N. J.) 169; *Jones v. Stites*, 4 C. E. Gr. (N. J.) 324; or "without an heir," *Rowe v. White*, 1 C. E. Gr. (N. J.) 411 (construed as a limitation upon subsequent condition); or die without any issue alive, *Den v. Schenck*, 3 Halst. 29; or "before my estate is settled," *Calkins v. Smith's Estate*, 41 Mich. 409; or on condition that "he lives to be 21 and has issue," *Sayward v. Sayward*, 7 Greenl. 210; or if testator's whole estate be worth a certain amount, *Kirkman v. Mason*, 17 Ala. 134; or a bequest of slaves on condition that they should be emancipated at a certain time, *Finley v. Hunter*, 2 Strobb. Eq. 208. So, "if real estate be

It is often difficult, from the absence of declared intention on the point, (*h*) to determine what is the period allowed for the performance of a condition; *i. e.*, whether the devisee is bound to perform the act within a convenient time after the vesting of the interest (*i*) or has his whole life for its performance.⁷ One *of these conclusions seems to be inevitable, for the nature of the case

devised to A *if* or *when he shall attain a given age*, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent and A takes an immediate vested estate subject to be divested upon his death under the specified age," Hawkins on Wills 240; Gregg v. Bethea, 6 Port. (Ala.) 21; Watkins v. Quarles, 23 Ark. 179; Scott v. Logan, Id. 352; Bowman v. Long, 23 Ga. 247; Roberts v. Brinker, 4 Dana 573; Allan v. Vanmeter, 1 Metc. (Ky.) 264; Danforth v. Talbot, 7 B. Mon. 623; Grigsby v. Breckinridge, 12 B. Mon. 632; Scott v. Price, 2 Serg. & R. 59. But "if he should live to be 21" was construed to be a condition precedent, the devise nevertheless vesting, Kelso v. Cuming, 1 Redf. 392; Bowman v. Long, 23 Ga. 247. A devise, however, to A when he attains a certain age, with particular estate to another until that time, is held not to be a condition, but a devise to first taker for a term of years, with remainder to A, Hawkins on Wills 237; Johnson v. Valentine, 4 Sandf. 36; Collier's Will, 40 Mo. 287; Hathaway v. Leary, 2 Jones Eq. 264; Sims v. Smith, 6 Jones Eq. 347; Rivers v. Trippe, 4 Rich. Eq. 276. This seems also to be the rule in England: Webster v. Parr, 26 Beav. 236 (1858); Pearman v. Pearman, 33 Beav. 394 (1864); Locke v. Lambe, 4 L. R., Eq. 372 (1866.) A condition in legacy to A, that if the testator's estate has to pay a certain debt for A's husband, her interest shall be forfeited, is a condition subsequent, but is not forfeited by failure on the part of A to repay testator in his lifetime the debt which he had paid, Lewis v. Henry, 28

Gratt. 192. And a gift to daughters as they attain twenty-one or marry, provided such marriage take place with consent of A, has been held to be upon a condition subsequent, in Collett v. Collett, 35 Beav. 312 (1866.)

[(*h*) Or from the ambiguity of the declaration. See, for instance, Langdale v. Briggs, 3 Sm. & Gif. 255, 8 D., M. & G. 391; Blagrove v. Bradshaw, 4 Drew. 230.]

(*i*) This is generally requisite where another is prejudiced by delay. See *n.*, (T 1,) 1 Rep. 25 b.]

7. "It is a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance," Marshall, C. J., in Finlay v. King, 3 Pet. 346. Other cases hold that the performance must be within a *reasonable time*, Carter v. Carter, 14 Pick. 424; Ross v. Tremaine, 2 Metc. 495; Drew v. Wakefield, 54 Me. 291. It is also true that ignorance of the condition does not excuse the non-performance. Thus, In re Hodge's Legacy, 16 L. R., Eq. 92 (1873), a condition that the legacy should be reduced £5000, if the legatee did not within six months relinquish to his brothers and sisters his interest in a certain other estate, was forfeited by his failure to do so, although the legatee was in India, and had no knowledge of the condition, and did afterwards relinquish the other estate after the expiration of the six months. So in Powell v. Rawle, 18 L. R., Eq. 243 (1874), where the condition was that the legacy be "duly claimed" within three months, and the legatee did not know of or claim it for two years.

hardly admits of any other alternative. [Page *v. Hayward* (*k*) is an instance of the devisee having his whole life for the performance of the condition; and] in *Gulliver v. Ashby*, (*l*) where a devise in tail was declared to be upon condition that the devisee assumed a certain name, Ashton, J., thought the devisee had his whole life for taking the name, and Lord Mansfield said that the court would perhaps incline against the rigor of the forfeiture, though the condition remained unperformed three years after the estate devolved upon the devisee, when he suffered a common recovery, and though some of the expressions in the will certainly favored a more rigid construction; the testator's requisition being, that whenever it should happen that the estate should come to any of the persons thereinbefore named (there being several successive limitations,) the person or persons to whom the same should from time to time descend or come, did and should "then" change, &c. [But the point was not decided; the court holding that the plaintiff, who was the next remainderman, was not entitled to take advantage of the breach, if there was one. If] the estate was not divested at the time of the recovery, of course such recovery destroyed the condition; which leads us to observe, that to render effectual such conditions imposed upon tenants in tail, they should (so far as is practicable, consistently with the rule against perpetuities) be made to precede the vesting; for, if subsequent, whether accompanied by a devise over or not, they are, as we have seen, liable to be defeated by the act of the person to whose

[(*k*) 1 Salk. 570.]

(*l*) 1 W. Bl. 607, 4 Burr. 1929. In *Davies v. Lowndes*, 2 Scott 67, 1 Bing. N. C. 597, in the event of the testator's lawful heir not being found within a year after his decease, he devised certain lands to A, "upon condition he changes his name to S." A did not change his name to S. within the year, but he did so after the date of a final decree in a suit in chancery, which gave him the possession of the property; and this was adjudged sufficient. [And see *Bennett v. Bennett*, 2 Dr. & Sm. 275.]

As to what amounts to a compliance with particular requisitions, see *Montague v. Beaucherk*, 3 B. P. C. Toml. 277; *Roe d. Sampson v. Down*, 2 Chit. Cas. temp. Mansfield 529; *Doe d. Duke of*

Norfolk v. Hawke, 2 East 481; [*Tanner v. Tebbutt*, 2 Y. & C. C. C. 225; *Ledward v. Hassels*, 2 K. & J. 370; *Priestley v. Holgate*, 3 Id. 286; *Woods v. Townley*, 11 Hare 314.] Whether neglect amounts to refusal, see 2 East 487, and Lord Ellenborough's judgment in *Doe d. Kenrick v. Lord Beaucherk*, 11 East 667; [In re *Conington's Will*, 6 Jur. (N. S.) 992. Condition that A shall convey on the request of B: if B do not make the request in A's lifetime, the condition becomes impossible. *Doe d. Davies v. Davies*, 16 Q. B. 951. Option to purchase within one year after the death of tenant for life (who died before testator) held well exercised within one year after testator's death, *Evans v. Stratford*, 2 H. & M. 142.]

estate they are annexed. (*m*) [For this reason, Lord Mansfield thought that such *a condition annexed to an estate tail could never be meant to be compulsory; and Yates, J., in the last case, said the condition could only operate as a recommendation or desire. But where a condition not to mow a park was annexed to an estate *for life*, without any gift over on breach, the condition was enforced by injunction.](*n*)

Conditions becoming incapable of performance.

Conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable. ⁸

If condition be precedent, estate never arises.

It is clear that where a condition *precedent* [annexed to a devise of real estate or of a charge on realty] becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails. (*o*) ⁹

Thus, where a testator, (*p*) being seized in fee of certain lands, and of other lands for life, under the will of C., devised both estates to trustees, to be conveyed to other trustees, to the use of R. (who was tenant in tail next in remainder under the will) for life; remainder to his first and other sons in tail male, remainders over. The devise was upon express condition that R. should within six months suffer a recovery, and bar the remainders in C.'s will, and convey all her estates to such uses, &c., as were declared by his (testator's) will as to his own estates, *and no conveyance of his estates was to be made before R. had*

(*m*) Page *v.* Hayward, 2 Salk. 570; *Watson v.* Earl of Lincoln, Amb. 328; *Driver d. Edgar v. Edgar*, Cowp. 379.

[(*n*) Blagrove *v.* Blagrove, 1 De G. & S. 252.]

8. "The general rule of the common law in regard to conditions is that if they are impossible at the time of their creation—or afterwards become impossible by the act of God or of the party who is entitled to the benefit of them—or if they are contrary to law—or if they are repugnant to the nature of the estate or grant, they are void. * * * In the view of the common law a condition is considered as impossible, *only when it cannot by any human means take effect*," 2 Story's Eq. Jur., §§ 1304, 1306. "Under the head of impossible conditions may be classed those where testators through

ignorance have required acts to be done that have been performed or events to happen which have taken place," Flood on Wills 438; 1 Rep. on Leg. 755.

[(*o*) Co. Lit. 206 b.]

9. Wms. Ex'rs (6th Am. ed.) 1370; Theobald on Wills 264; 2 Redf. on Wills 285. In Theobald on Wills 264, the rule is laid down that "as regards *reality and personalty* a condition precedent which becomes impossible by the act of the testator is discharged."

(*p*) Roundel *v.* Curren, 2 B. C. C. 67; 1 Swanst. 383, n. See also Bertie *v.* Falkland, 3 Ch. Cas. 129, 2 Vern. 340, 1 Eq. Cas. Ab. 110, pl. 10; [Robinson *v.* Wheelwright, 6 D., M. & G. 535; Earl of Shrewsbury *v.* Scott, 29 L. J., C. P. 34, 6 Jur. (N. S.) 452, 472.

suffered the recovery; and, in default of his suffering such recovery, to convey his (testator's) estates to other uses. He also directed R. to take the name of C., and declared this to be a condition precedent to the vesting of his estate. R., on the testator's death, entered, and was preparing to suffer the recovery, when he died. Sir Ll. Kenyon, M. R., appeared to consider this to be in the nature of a condition precedent, and decreed that, the act directed by the testator not being done, the estates created by him never arose. In answer to the argument that there was scarcely an opportunity, and that there was no neglect, and that if it was prevented by the act of God, it should be held as done, his Honor said that there were many cases where the act is rendered impossible to be done, and yet the estate should not vest; as an estate given to A on condition that he shall enfeoff B of Whiteacre, and B refuses to accept, the estate would not vest in A.

[So, in *Boyce v. Boyce*, (q) where a testator devised his houses to trustees, in trust to convey to his daughter M. such one of the houses as she should choose, and to convey and assure all the others which M. should not choose to his daughter C.; M. died in the testator's lifetime, and Sir L. Shadwell, V. C., considering the gift to C. to be of those houses that should remain *provided* M. should choose one of them, (r) held that the condition having become impossible by M.'s death, the gift to C. failed.] -

On the other hand, it is clear that if performance of a condition *subsequent* be rendered impossible, the estate to which it is annexed [whether in land or money legacies] becomes by that event absolute. 10

If condition subsequent is incapable of performance, estate becomes absolute.

[(q) 16 Sim. 476. See also *Philpott v. St. George's Hospital*, 21 Beav. 134.

(r) As to this part of the decision, see *ante* p. *365.]

10. "If the condition subsequent be possible at the time of making it and becomes afterwards impossible to be complied with either by the act of God or of the law or of the grantor—or if it be impossible at the time of making it or against law, the estate of the grantee being once vested is not thereby divested but becomes absolute," 4 Kent Com. 125; 1 Rop. on Leg. 783. In *McLachlan v. McLachlan*, 9 Paige 534, a devise of a remainder in fee limited over after an es-

tate for years, subject to the condition (subsequent) that the remainderman "shall settle and reside on the farm," was held to be discharged from the condition by his death during the term for years. So in *Merrill v. Emery*, 10 Pick. 507, a devise to A subject to the condition that she "educate and bring up my granddaughter," the performance becoming impossible by the death of A immediately after the testator; and in *Parker v. Parker*, 123 Mass. 584, where the impossibility was caused by the death of the person to be supported. So a devise in fee to A, "provided she shall convey to her heir in the George line," and A never

Thus in *Thomas v. Howell*,^(s) where one devised to his eldest daughter, on condition that she should marry his nephew on or before she attained the age of twenty-one years. The nephew died young; and after his death, the devisee, being then under twenty-one, married another. It was held, that the condition was not broken, its performance having become impossible by the act of God. It is not, indeed, expressly stated in this case that the court held the condition to be subsequent; but, as it seems fairly to bear that construction, and the decision would otherwise stand opposed to the doctrine under consideration, it may reasonably be inferred that such was the opinion of the court.

This rule has been often laid down in very general terms, sufficient, indeed, to include a case where the property is given over on non-performance; and *Graydon v. Hicks*^(t) might seem to countenance its application even to such a case. A testator there gave £1000 to his only daughter M. to be paid at her age of twenty-one, or day of marriage, provided she married with the consent of his executors; but, in case she died before the money became payable upon the conditions aforesaid, then he gave the same over. The executors died. M. afterwards married; and Lord Hardwicke held that, [notwithstanding the gift over,] the death of the persons whose consent was necessary relieved her from the restriction.

*It does not appear whether the claimant had reached the age of twenty-one: but it will be observed that marriage with consent was not the only condition on which the legacy was to be payable; ^(u) it only accelerated the payment; so that it was impossible for the court to declare, as was asked, that the legacy was

had such an heir, *George v. George*, 47 N. H. 27; so a devise to A if he pay a certain valuation of the land for legacies, and the land is taken by devisee at the valuation, and the fund wholly consumed by testator's debts, *Laurens v. Lucas*, 6 Rich. Eq. 217. So in *U. S. v. Arredondo*, 6 Pet. 745, a grant by the Kingdom of Spain of a tract in Florida, on condition that the grantee settle two hundred Spanish families on it, the performance being afterwards rendered impossible by grantor's act ceding Florida to the U. S. See also *Wms. Ex'rs* (6th Am. ed.) 1370; 2 Redf. on Wills 285. So a condition sub-

sequent that the legatee apply for the legacy within five years, rendered impossible by his death as he was starting out in due time to make application, was thereby discharged, *Hutchins' Estate*, 9 Phila. 300.

(s) 1 Salk. 170. See also *Aislabie v. Rice*, 3 Mad. 256, 2 J. B. Moo. 358; [*Burchett v. Woolward*, T. & R. 442; *Walker v. Walker*, 2 D., F. & J. 255, 29 L. J., Ch. 856 (legacy.)]

(t) 2 Atk. 16. Also *Peyton v. Bury*, 2 P. W. 626; but see *infra*.

(u) See *King v. Withers*, 1 Eq. Cas. Ab. 112, pl. 10.

forfeited by marriage without consent. This case, therefore, leaves the question untouched. (x) [However, the point was ^{The distinction rejected.} decided in *Collett v. Collett*, (y) where a testator gave a share of his real and personal estate to his daughter, her heirs, executors, &c., and declared that it should become payable at her age of twenty-one or day of marriage, provided such marriage should be with the consent of his wife; but in case of the daughter's death "without having attained twenty-one or been so married" then over. The wife died; after which the daughter married, and was still under age. Lord Romilly said the question depended on whether the condition requiring consent was precedent or subsequent. He thought it was subsequent; that the death of the wife having made it impossible, compliance was dispensed with; and that the gift over (in which *he

[(x) The reasons for the distinction were thus stated in 1st ed.] Where property is devised to a person, with a proviso divesting his estate in favor of another, if he (the first devisee) do not marry A, or do not enfeoff A of Whiteacre, within a given period, and A in the meantime dies, or refuses to marry the devisee, or be enfeoffed of Whiteacre, these are contingencies inseparably incident to such a condition, and may therefore be supposed to have been in the testator's contemplation when he imposed it; and having said that the estate shall be divested in case the act be not performed (not merely on its not being *attempted* to be performed) he is presumed to mean that it shall be divested if the act, under whatever circumstances, is not performed, though it may have been rendered impracticable by events over which the devisee has no control. But it may be said that this reasoning applies to *all* cases of conditions subsequent, as well those which are *not*, as those which *are*, accompanied by a gift over; and that, in regard to the former, the doctrine in question is fully established. The stronger argument, therefore, in favor of the distinction suggested, because it is applicable exclusively to the latter class of cases, is, that where there is a devise over on

non-performance, the court, by making the estate of the first devisee absolute, would *take the property from the substituted devisee in an event in which the testator has given it to him*. If the gift had been simply to B, in case A do not marry C, or enfeoff C of Whiteacre, it could not have been maintained for an instant that B's estate did not arise, in the event of the death or refusal of C; and why should the result be different because A happens to be the prior devisee? There seems to be no solid ground for treating with such unequal regard these respective objects of the testator's bounty: and the cases on marriage conditions afford (as we shall presently see) abundance of authority for the principle which ascribes this kind of efficiency to a bequest over.

[(y) 35 Beav. 312. If, as would appear from *Dawson v. Oliver-Massey*, 2 Ch. D. 753, a condition requiring the consent of parents, guardians or trustees to the marriage of the devisee or legatee is to be understood as itself subject to a tacit qualification that the person whose consent is required shall be living when the marriage takes place, the facts of this case furnish a special ground for the decision without touching the general question. But the observations of the M. R. are general.

read "or" as "and") did not take effect. A doubt had been expressed (he said) whether, in the case of a gift over, the gift over would not take effect if the condition, though a condition subsequent, were not specifically performed, whatever might be the reason of the failure. But he thought *Graydon v. Hicks* was an authority to show that the gift over would not take effect if the performance of the condition had become impossible by the act of God. He thought this was "the proper conclusion to be drawn from the cases which decided that, when the performance of the condition *in toto* had not taken place because the performance of a portion of the condition had become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition would be dispensed with." He therefore ordered the property to be transferred to the trustees of the daughter's settlement (made under 18 and 19 Vict., c. 43,) although she had not attained twenty-one.

So, where the condition is impossible in its creation, as, to go to Rome in a day; or illegal, as to kill a man, or to convey land to a charity; if the condition is precedent, the devise, being of real estate, is itself void; (z) if the condition is subsequent, the devise, whether of real or personal estate, is absolute. (a) 11

But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that

Conditions impossible *ab initio*, or illegal.

Distinctions in case of personal bequest.

(z) *Shep. Touch.* 132, 133.

(a) *Shep. Touch.* 132, 133; *Co. Lit.* 206; *Poor v. Mial*, 6 *Mad.* 32 (charity); and the following cases on provisions for separation of husband and wife: *Cartwright v. Cartwright*, 3 *D., M. & G.* 982; *H. v. W.* 3 *K. & J.* 382; *Bean v. Griffiths*, 1 *Jur. (N. S.)* 1045; *Wren v. Bradley*, 2 *De G. & S.* 49; *Shewell v. Dwarries*, *Johns.* 172. In the last case the condition was upheld on the ground that it had regard only to the state of circumstances at the testator's death, and therefore could have no influence on future conduct.]

11. An illegal condition precedent defeats the devise; an illegal condition subsequent is itself void, and the devise

stands. No distinction is made in either case between *malum prohibitum* and *malum in se*, *Wms. Ex'rs* (6th Am. ed.) 1372; 2 *Redf. on Wills* 285; *Carter v. Carter*, 39 *Ala.* 579; *Cheairs v. Smith*, 37 *Miss.* 646; *Spencer v. Negro Dennis*, 8 *Gill* 314; *Barksdale v. Elam*, 30 *Miss.* 694; *Theobald on Wills* 264; 1 *Story's Eq. Jur.*, § 291. *Conrad v. Long*, 33 *Mich.* 78, a devise to A, "if at any time subsequent she should conclude not to live with her husband," but if she live with him, then over, was held to be upon an illegal and void condition subsequent, the devise being absolute, and the limitation over void. For similar conditions as to legacies, see note 14 in this chapter.

where a condition precedent is originally impossible, (b) or is made so by the act or default of the testator, (c) or is illegal as involving *malum prohibitum*, (d) the bequest is absolute,¹² just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, (e) or its impossibility was unknown to the testator, (f) or the condition which was possible in its creation has since become *impossible by the act of God, (g)¹³ or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void. (h)¹⁴

[(b) 1 Ed. 115, 116; 1 Wils. 160.

(c) *Darley v. Langworthy*, 3 B. P. C. Toml. 359; *Gath v. Burton*, 1 Beav. 478.

(d) *Brown v. Peck*, 1 Ed. 140; *Harvey v. Aston*, Com. Rep. 738; *Wren v. Bradley*, 2 De G. & S. 49.]

12. Theobald on Wills 264; Flood on Wills 437, 438; 1 Rep. on Leg. 755; Wms. Ex'rs (6th Am. ed.) 1370; 2 Redf. on Wills 285; 1 Rep. on Leg. 755, 783. In *Culin's Appeal*, 20 Penna. St. 243, a legacy to A, "if her husband should refrain from strong drink for one year after the decease of B," was rendered absolute, the performance of the condition (subsequent) becoming impossible by death of A's husband before B. So in *Five Points House of Ind. v. Cornell*, 11 Hun 161, a legacy for life remainder in fee "to be applied to the uses of the farm in W," performance being made impossible by sale of the farm before termination of the life estate. Of similar character is the condition of a replevin bond to prosecute action, *Badlam v. Tucker*, 1 Pick. 284, or an injunction bond to have slaves forthcoming, *Mosely v. Baker*, 2 Sneed 362—the performance being rendered impossible by the death of the defendant in the one case and of the slaves in the other. But if the impossibility is caused by the act of the party bound by the condition, it cannot avail for his discharge, *Jones v. Walker*, 13 B. Mon. 163.

[(e) Wms. Ex'rs (6th ed.) 1174; *Rish-ton v. Cobb*, 5 M. & C. 145.

(f) 1 Swinb., pt. IV., § 6, pl. 8, 9.

(g) 1 Swinb., pt. IV., § 6, pl. 14; *Lowther v. Cavendish*, 1 Ed. 99; 1 Rep. on Leg. 755, 4th ed. *Priestley v. Holgate*, 3 K. & J. 286.]

13. In *Stover's Appeal*, 77 Penna. St. 282, an annuity payable to A "upon his personal application, and to no other person for him," and if he shall not apply for it for five years after payment become due, it shall fall into the residue, was held to fall with the condition, the performance of which became impossible by A's death before application or payment. So in *Mackay v. Moore*, Dud. (Ga.) 94, in which case a legacy was made payable in event of legatee's removal becoming necessary, the necessity to be determined by a majority of the executors, this being made impossible by the death of the executors. See also 1 Rep. on Leg. 755.

[(h) 1 Swinb., pt. IV., § 6, pl. 16.]

14. Illegal conditions subsequent to a legacy have no effect to defeat its operation, nor do conditions precedent involving a *malum prohibitum*, but a legacy will be defeated by a condition precedent requiring a *malum in se*, Wms. Ex'rs (6th Am. ed.) 1372; 2 Redf. on Wills 285; 1 Rep. on Leg. 756. Thus a condition that gift to A (the wife of B residing at S.) should be void "should she not cease to reside at S. within eighteen months of my decease," was held to be illegal as requiring an omission of the wife's duty, *Wilkinson v. Wilkinson*, 12 L. R., Eq. 604 (1871.) A condition requiring legatee's separation from her husband is con-

Rule where
legacy comes
out of both
realty and per-
sonalty.

Where a legacy is charged both on the real and personal estate, it will, so far as it is payable out of each species of property, be governed by the rules applicable to that

species. (i)

Conditions subsequent which are intended to defeat a vested estate or interest, are always construed strictly, and must therefore be so expressed as not to leave any doubt of the precise contingency intended to be provided for. This is a clearly established rule which we have already seen illustrated in a former chapter; (k) it will suffice here to refer to some of the later cases, in which it has been asserted and followed.] (l) 15

Conditions
subsequent are
construed
strictly.

Here it may be observed, that where the devisee, on whom a condition affecting real estate is imposed, is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice

Devisee, if
heir of the
testator, must
have notice of
the condition.

tra bonos mores and void, 2 Redf. on Wills 294; unless it provides for support during an involuntary separation, *Cooper v. Clason*, 3 Johns. Ch. 521; or a separation existing when the will was made, *Cooper v. Remsen*, 5 Johns. Ch. 459, in which last case the separation had afterwards ceased and the legatee was held not to entitle herself to the legacy by a subsequent separation voluntarily and for that purpose.

[(i) 3 Atk. 335.

(k) *Ante* p. *827.

(l) *Clavering v. Ellison*, 3 Drew. 451, 7 H. L. Cas. 707; *Kiallmark v. Kiallmark*, 26 L. J., Ch. 1; *Bean v. Griffiths*, 1 Jur. (N. S.) 1045; *Langdale v. Briggs*, 8 D., M. & G. 429, 430; *Hervey-Bathurst v. Stanley*, 4 Ch. D. 272. And see *post* pp. *18, *19.]

15. 4 Kent Com. 125; *Michigan Bank v. Hastings*, 1 Doug. (Mich.) 225; *Hooper v. Cummings*, 45 Me. 359; *Den v. Lawrence*, Spenc. 551; *Ward v. New Eng. Screw Co.*, 1 Cliff. C. C. 565; 1 Wms. Ex'rs (6th Am. ed.) 1383; *Martin v. Ballou*, 13 Barb. 119; *Patten v. Tallman*, 27 Me. 17. It may be added that a court of equity will not enforce a condition

subsequent, and will relieve against forfeiture by reason of it, unless there be a gift over, *Flood on Wills* 438; *Smith v. Jewett*, 40 N. H. 530; 2 Story's Eq. 1319; also that a stranger cannot take advantage of the breach of a condition subsequent, *Webster v. Cooper*, 14 How. 488; *Taylor v. Mason*, 9 Wheat. 325; *Finlay v. King*, 3 Pet. 347; also that a condition subsequent may be waived by him who has the right to take advantage of its forfeiture, 2 Washb. on Real Prop. 15; *Petro v. Cassiday*, 13 Ind. 289; *Boone v. Tipton*, 15 Ind. 270; *Rush v. Rush*, 40 Ind. 83; *Ransom v. N. Y.*, 4 Blatch. C. C. 157. It has also been held that a demand is necessary before forfeiture of a condition subsequent, *Lindsey v. Lindsey*, 45 Ind. 552; that a claimant under forfeiture of a condition subsequent must show fulfillment on his part, *Den v. Steelman*, 5 Halst. 243; that coverture is no excuse for the non-performance of a condition subsequent, *Garrett v. Scouten*, 3 Denio 334; and that evidence is not admissible to show that the operation of a delivered deed was to depend on a condition subsequent not expressed, *Black v. Shreve*, 2 Beas. 454.

thereof; ¹⁶ for as he has, independently of the will, a title by descent, it is not necessarily to be presumed, from his entry on the land, that he is cognizant of the condition; ^(m) and the fact of notice must be proved; it will not be inferred. ⁽ⁿ⁾ [It is otherwise where the devisee is a stranger; for as he claims only under the will, he must comply with its provisions, and ignorance of them however arising is no excuse for non-compliance.] ^(o)

II.—Conditions that are repugnant to the estate to which they are annexed, are absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by ^{Repugnant conditions.} a proviso or condition, which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute. ¹⁷ Such would, it is clear, be the fate of any clause providing that the land should forever thereafter be let at a definite rent, ^(p) or be cultivated in a *certain manner; this being an

16. 1 Rop. on Leg. 839; Shackelford v. Hall, 19 Ill. 212; Theobald on Wills 310.

^(m) Doe d. Kenrick v. Lord Beauclerk, 11 East 667.

⁽ⁿ⁾ Doe d. Taylor v. Crisp, 8 Ad. & El. 778.

[^(o) Lady Fry's Case, 1 Vent. 199; Burgess v. Robinson, 3 Mer. 7; Carter v. Carter, 3 K. & J. 618; In re Hodges' Legacy, L. R., 16 Eq. 92; Powell v. Rawle, L. R., 18 Eq. 243; Astley v. E. of Essex, Id. 290.]

17. 4 Kent Com. 126; Flood on Wills 445; 2 Redf. on Wills 288; Wms. Ex'rs (6th Am. ed.) 1374; 1 Rop. on Leg. 785; Stockton v. Turner, 7 J. J. Marsh. 192. Thus a trust for the benefit of A, to fall upon certain condition into the residue of testator's estate, "but so that the husband of A shall take no share therein as representing his wife," was discharged from the condition as repugnant, in Bevis's Trusts, 20 W. R. 359; 26 L. T. R. (N. S. 1872) 239. So a devise absolutely to an illegitimate child, with proviso that "if the estate be undisposed of, or would but for this proviso go to the crown," it shall go over, is upon a repugnant and void condition. In the language

of Jessel, M. R., in this case, "a man cannot give property absolutely and at the same time say it shall not devolve according to law," In re Wilcocks, 1 L. R., Ch. D. 229 (1874.) So, too Hill v. Downes, 125 Mass. 509. But see Smith v. Clark, 10 Md. 186, in which case the devise was upon condition that the land be not cleared or converted into arable land. In Gray v. Blanchard, 8 Pick. 284, a condition that "no windows should be placed in the north wall" was held not to be repugnant. In this case the whole subject is discussed quite fully. In Nourse v. Merriam, 8 Cush. 11, a bequest for a free school to all the inhabitants of A excepting nine persons by name, and their descendants, was discharged from the exception as repugnant. A provision that a slave should leave the state in six months, Forward v. Thamer, 9 Gratt. 537, or that her children should be slaves, Fulton v. Shaw, 4 Rand. 597, has been held to be repugnant to a bequest of liberty to the slave.

Inskip v. Lade [or Lade v. Holford.] —(^p) Att.-Gen. v. Catherine Hall, Jac. 395. To this principle, it is conceived, may be referred the case of Inskip v.

attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership. But, of course, a direction that the rents of the *existing* tenants should not be raised, or that certain persons should be continued in the occupation, (q) would be valid; as this merely creates a reservation or exception out of the devise in favor of those individuals. [So, if there be a devise in fee upon condition that the wife shall not be endowed, or the husband be tenant by the curtesy, the condition is void, because repugnant to the estate devised. (r) And it was said by Lord Hardwicke, that a gift over in case devisee in fee or in tail should commit treason within a given term of years, would be void as abrogating the law.] (s)

A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A and his heirs, upon condition that he shall not alien, (t) [or charge them with any annuity,] (u) the condition is void. 18 And

General restraint on alienation by devisee in fee is void.

Lade, in Chancery, 16th June, 1741, 1 W. Bl. 428, Amb. 479, Butler's n. to Fearne C. R. 530,] where Sir John Lade, by will dated the 17th August, 1739, devised all his real estate to trustees, their heirs and assigns, to the use of his cousin John Inskip for life, with remainder to the use of the trustees for the life of John Inskip, to preserve contingent remainders, with remainder to the use of the first and other sons of John Inskip in tail male, with remainder to the use of several other persons and their issue, in strict settlement, in like manner; and the testator directed, that while John Inskip should be under the age of twenty-six, *and so often and during such time as the person for the time being, in case he had not otherwise directed, would, by virtue of his will, have been entitled to the said devised premises, or the trust thereof, as tenant for life in his own right, or tenant in tail male, should be severally under the age of twenty-six years*, his said trustees should enter upon the same premises, and receive the rents and profits thereof, and should [thereout maintain the person under age, and accumulate the residue, and invest the accumulations in purchasing other land to be settled to the

same uses.] On the 14th of November, 1760, Lord Northington sent a case to the Court of K. B., with the question, whether upon the death of John Inskip the cousin, leaving his eldest son under the age of twenty-six, the trustees took any and what estate under the proviso. The answer of the judges was in the negative; and their certificate was confirmed by the L. C.

It does not appear what was the precise ground of the decision—whether the proviso was adjudged to be invalid, as being repugnant to the several estates conferred by the devise, or as being obnoxious to the rule against perpetuities; on either ground, it seems open to exception: [but the latter appears to be the true ground, see Butler's n. cited above.]

(q) *Tibbetts v. Tibbetts*, 19 Ves. 656.

[(r) *Portington's Case*, 10 Rep. 36; *Mildmay's Case*, 6 Id. 40 a.

(s) *Carte v. Carte*, 3 Atk. 180. As to forfeiture for treason, see *ante* p. *43.]

(t) Co. Lit. 206 b, 223 a.

[(u) *Willis v. Hiscox*, 4 My. & C. 201.]
18. *Reifsnyder v. Hunter*, 19 Penna. St. 41; *Hall v. Tufts*, 18 Pick. 455; *Gleason v. Fayerweather*, 4 Gray 348; *Pardue v*

a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where (v) a ^{So of alienation in specified mode.} testator devised lands to A and his heirs forever, and in case he offered to mortgage or suffer a fine or recovery of the whole or any part, then to B and his heirs: it was held, that A took an absolute estate in fee, without being liable to be affected by his mortgaging, levying a *fine, or suffering a recovery. [And a condition not to alien except by way of exchange or for reinvesting in other land is equally bad. (x)]

So, if lands be devised to A and his heirs, with a gift over if he die intestate, or shall not part with the property in his lifetime, the gift over is repugnant and void; ^{Gift over if devisee dies intestate or without selling is void.} 19 since, in the first case, it would not only defeat the rule of law which

Givens, 1 Jones Eq. 306; Langdon v. Ingram, 28 Ind. 360; Hawley v. Northampton, 8 Mass. 37; Blackstone Bank v. Davis, 21 Pick. 42; Schermerhorn v. Negus, 1 Denio 448; Dick v. Pitchford, 1 Dev. & Bat. Eq. 480; Lovett v. Gillender, 35 N. Y. 617. But it seems that a devise to a town "to use and improve forever," the land to "be not sold but rented out and the rents applied toward the support of the gospel minister," will be forfeited by sale, Brigham v. Shattuck, 10 Pick. 305. And a devise to A and his heirs, he not to have the right to sell, assign or encumber the land, but it "to remain free for his children and heirs and he to have the use, income and profits for his life and power to dispose of it by will," has been construed to give A a life estate, the restrictions being upheld as valid, Ulrich v. Merkel, 81 Penna. St. 332; so a devise to wife for life, for the benefit of herself and children, the life interest not to be transferable and the land not to be cultivated by other hands, Trammell v. Johnston, 54 Ga. 340. And a bequest of slaves, with proviso that they should be free, if the legatee carried them out of the state or sold them, was held to be a gift over of their liberty to them on a valid condition, Williams v. Ash, 1 How. 1. In *McWilliams v. Nisly*, 2 Serg. & R. 5, a condition in a deed, that the grantee

(in fee) should not convey during grantor's life, unless grantor first sells his land, was held to be valid; but in *Walker v. Vincent*, 19 Penna. St. 369, a condition against alienation by a devisee in fee during her life, was held to be void.

(v) *Ware v. Cann*, 10 B. & Cr. 433.

[(x) *Hood v. Oglander*, 34 Beav. 513.]

19. And in general, a gift over by remainder or otherwise, after an absolute legacy or a devise in fee, of whatever may remain if the first legatee or devisee die without having disposed of it, is repugnant to the nature of the estate or interest first given, and void, *Ramsdell v. Ramsdell*, 21 Me. 288; *Pickering v. Langdon*, 22 Me. 413; *Burbank v. Whitney*, 24 Pick. 146; *Ide v. Ide*, 5 Mass. 500; *Gifford v. Choate*, 100 Mass. 346; *McDonald v. Walgrove*, 1 Sandf. 274; *Jackson v. Coleman*, 2 Johns. 391; *Jackson v. Bull*, 10 Johns. 18; *Jackson v. Robins*, 16 Johns. 586; *Melson v. Cooper*, 4 Leigh 408; *Sevier v. Brown*, 1 Swan 112; *McKenzie's Appeal*, 41 Conn. 607; *Sarle v. Court of Probate*, 7 R. I. 270; *Wms. Ex'rs* (6th Am. ed.) 1376; *Marshall v. Rivers*, 8 Rich. Eq. 85. But a provision that legatee have the income and the principal if it be required by her for her support, and if not, over at her death, is valid, *Bell v. Warn*, 4 Hun 406.

says, that upon the death intestate of an owner in fee simple his property shall go to his heir-at-law, but also deprive him of the power of alienation by act *inter vivos*; and, in the second case, it would take away the testamentary power from an owner in fee. (y) And if the devised interest is transmissible, it is immaterial that it is contingent: the gift over on death intestate is still void. (z)

If, in the case put, A dies in the testator's lifetime, so that the devise to him lapses, the land is undisposed of. (a) This position has, indeed, been questioned by a learned judge, (b) on the ground that there can be no repugnance in fact until the devise has vested in A, and that when this event has failed simply through lapse, the gift over ought to be held good. It is submitted, however, that the position is defensible in law. It is difficult indeed to apply such a gift over to the period antecedent to the testator's death, or to suppose that he intended it to be so applied; since until after the testator's death, A can neither devise the land, nor, in any proper sense of the condition, die intestate of it; compliance and non-compliance are both equally out of his reach. (c) But assuming that the gift over is applicable to the period before as well as to the period after the testator's death, the limitation must, to support the learned judge's view, be split up and remodeled so as to introduce, first, an alternative gift to take effect if the original gift never vests, *i. e.*, if A dies before the testator; and, secondly, an executory gift to take effect in defeasance of the original gift after the latter has vested. To such

(y) *Holmes v. Godson*, 8 D., M. & G. 152; *Gulliver v. Vaux*, Serj. Hill's MSS. in Linc. Inn Library, lib. X., fo. 282, to the same effect, cited in *Holmes v. Godson*; *Barton v. Barton*, 3 K. & J. 512; *Shaw v. Ford*, 7 Ch. D. 669. Real and personal estate are for this purpose classed together, Co. Lit. 223 a. *Doe d. Stevenson v. Glover*, 1 C. B. 448, must be treated as overruled.

(z) *Barton v. Barton*, 3 K. & J. 516, per Wood, V. C.]

(a) *Hughes v. Ellis*, 20 Beav. 193 (personalty); *Greated v. Greated*, 26 Beav. 621.

(b) James, L. J., in *re Stringer's Estate*, 6 Ch. D. 15. *Baggallay* and *Bramwell*, L. JJ., were silent on this point.

Jessel, M. R., had followed *Hughes v. Ellis* without full argument, but without any inclination to differ from it, 6 Ch. D. 7. On appeal, it became unnecessary to decide the point, because the court spelt out of the context an alternative gift, by implication, in the event of the devisee dying before the testator, as well as a gift over in the event of his surviving him, but not disposing of the devised estate.

(c) If the original donee is the testator's wife (as in *Hughes v. Ellis*) who, if she dies before him, necessarily dies altogether intestate—this is an additional and distinct, but (it is submitted) not an essential, reason, against such an application of the gift over.

a process the case of *Andrew v. Andrew* (*d*) seems in principle to be strongly opposed. In that case a testator bequeathed consumable articles to his sister for her life, or so long as she should remain unmarried, "in either events then to go over to" A. The sister married in the testator's lifetime. It was held by Sir J. K. Bruce, V. C., that the gift over was void. There was no express reference, he observed, to the happening of any event in the testator's lifetime: the testator meant death or marriage whensoever happening, not death or marriage happening only in his lifetime. "The words were intended to operate by way of remainder. It is a gift to her so long as she shall be living unmarried, and then over. Now the gift of consumable articles to a woman so long as she shall be living unmarried, is the gift of an absolute interest. (*e*) The gift over, therefore, is void, nor rendered valid by the circumstance of the legatee having survived the testator and married in his lifetime."]

But such a partial restraint on the disposing power of a tenant in fee may be imposed, as that he shall not alien to such a one, ²⁰ or to the heirs of such a one, or that he shall not alien in mortmain. (*f*)

Restraints on alienation by devisees in fee, how far valid.

It appears too that a condition imposed on a devisee in fee not to alien except to particular persons is good. ²¹ Thus, where (*g*) a testator devised to his two daughters A. and H. his lands in the county of Y., (subject to some legacies,) to hold to them, their heirs and assigns, as tenants in common, "upon this special proviso and condi-

[(*d*) 1 Coll. 690.

(*e*) *Vide* ch. XXVI. *ad fin.*]

20. *Langdon v. Ingram*, 28 Ind. 360; but in *Barnard v. Bailey*, 2 Harring. 56, a condition that devisee "should not will to A" was held to be repugnant and void. In *Brothers v. McCurdy*, 36 Penna. St. 407, a devise to a son was limited over "should he offer to sell to B"—this condition was held to be repugnant and void, and the limitation over failed. In *Den v. Gibbons*, 2 Zab. 117, it seems to have been questioned whether a condition avoiding the devise "if devisee should devise to T. or his descendants," was repugnant or not.

(*f*) Co. Lit. 223 a. [As to *Ludlow v. Bunbury*, 35 Beav. 36, *qu.*]

21. A condition that devisees should not convey, except to each other, on pain of forfeiture, was held repugnant in *Schermerhorn v. Negus*, 1 Denio 448. So a devise with condition not to dispose of the land except to devisee's heirs, *Williams v. Jones*, 2 Swan 620; or "to the legitimate heirs of his father's family at his decease," *McCullough's Heirs v. Gilmore*, 1 Jones (Pa.) 370. But it seems that a condition "not to convey except to H." is valid, *McKinster v. Smith*, 27 Conn. 628; or that "if devisee should incline to sell, he shall sell to his brother and no other person, *Den v. Blackwell*, 3 Gr. (N. J.) 386.

(*g*) *Doe d. Gill v. Pearson*, 6 East 173.

tion," that in case his said daughters, or either of them, should have no lawful issue, that then, and in such case, they or she, having no lawful issue as aforesaid, should have no power to dispose of her share in the said estates so above given to them, *except to her sister or sisters, or to their children*; and the testator devised the residue of his real estate to his said two daughters in fee. A. married W., and levied a fine of her moiety, declaring the uses in trust for W. in fee, and died without having had any issue. It was held, that this occasioned a forfeiture entitling the heir to enter. Lord Ellenborough*—"We think that the condition is good; for, according to the case of *Daniel v. Ubley*, (*h*) though the judges did not agree as to the effect of a devise 'to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased;' Jones, J., thinking it gave an estate for life, with a power to dispose of the reversion among the sons; the other judges, according to his report, thinking it gave her a fee simple in trust to convey to any of her sons; yet, in that case, it was not doubted but that she might have given her a fee simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken; which estate Jones thought the devise gave, if it did not give a life estate with a power of disposing of the reversion among the sons. And Dodderidge said, (*i*) 'he conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children;' and concluded his argument on this point, by saying, that 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons.' And there is a case (*k*) to this effect: 'A devise to a wife to dispose and employ the land on herself and her sons at her will and pleasure;' and Dier and Walsh held she had a fee simple, but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give it to one of her sons."

[But the limit within which a restraint of this nature is good, is shown by *Muschamp v. Bluet*, (*l*) where it was held, that a condition not to alienate to any but J. S., imposed on a devisee in fee simple, was void: "for," it was said, "to restrain generally, and that he shall alien to none but J. S., is all one; for then feoffor may restrain from aliening to any but himself, or such

Condition not to alien but to a particular class held good.

Condition to alien to none but A, bad; *Muschamp v. Bluet*.

(*h*) Sir W. Jones 137, Latch 9, 39, 134.

(*k*) Dalison 58.

[(*l*) J. Bridgm. 132, 137.

(*i*) Latch 37.

other person *by name* whom he *may* well know cannot nor never will purchase. * * * Neither is there any authority to warrant this restraint, for Littleton leaves the feoffee at liberty to alien to any but J. S."

In *Attwater v. Attwater*, (m) Sir J. Romilly held that this principle was applicable to a devise of land to A in fee subject to "an injunction never to sell it out of the family, but if sold at all it must be to one of A's brothers *hereafter named*," and that "notwithstanding *Doe v. Pearson*," the condition was void.

Attwater v. Attwater.

*There is certainly a distinction between a case like *Doe v. Pearson*, where alienation is restricted to an unascertained class, and one like *Attwater v. Attwater*, where it is restricted to named or ascertained persons; for in the latter case all might be selected paupers. But though the condition in *Daniel v. Ubley* was of the latter kind ("to dispose of to such of *my* sons as she thinks best,") the judges took no objection to it, as a condition, on that ground; and in *In re Macleay*, (n) Sir G. Jessel, M. R., while apparently approving of the principle of *Muschamp v. Bluet* (since you might not do that indirectly which you might not do directly,) dissented from his predecessor's application of it. According to the old books, he said, the test was whether the condition took away the *whole* power of alienation *substantially*. The condition before him (viz. "not to sell out of the family") did not do so; for it permitted of a sale, (o) not to one person only, but to a class, many of whom were named in the will; it was probably a large class, and was certainly not small: the restriction was therefore limited, and consequently valid.

Attwater v. Attwater questioned.

In re Macleay.

On the principle that a restraint is good which does not substantially take away all power of alienation, a condition will, it seems, be supported which prohibits alienation until after a defined and not too remote period of time. 22 Thus

Restraint on alienation limited to a stated period, good.

(m) 18 Beav. 330.

(n) L. R., 20 Eq. 189.

(o) The M. R. observed it was a limited restriction in this also, that a sale only and not any other mode of alienation was prohibited. But see *Ware v. Cann*, 10 B. & Cr. 433, cited above.]

22. The following cases illustrate the divergence of American decisions upon this point: In *Stewart v. Barrow*, 7

Bush 368, a condition against alienation for a specified time was held valid; so until youngest son comes of age, *Langdon v. Ingram*, 28 Ind. 360; and in *Walton v. Torrey*, Harring. Ch. (Mich.) 259; and *Roosevelt v. Thurman*, 1 Johns. Ch. 220, the same condition was held to be void. In *Mandelbaum v. McDonnell*, 29 Mich. 78, Judge Christiancy says, "We are entirely satisfied there has never been a

in *Large's Case*, (*p*) where a testator devised lands to his wife until his son W. should attain the age of twenty-two, with remainder to testator's sons A. and J., upon condition that if either of them, before W. attained twenty-two, should go about to make any sale of any part, he should *forever* lose the lands, and the same should remain over. Before W. attained twenty-two A. leased for four successive terms of sixty years without rent: and it was argued that this condition was good, for the devisee was not utterly restrained from selling, but only until W. should attain twenty-two, and that the lease was a breach; and it was afterwards adjudged that the lease was a sale within the intent of the will.

So in *Barnett v. Blake*, (*q*) where by deed freehold and leasehold property was settled in trust upon a certain event to be conveyed to six named persons (it is presumed in fee,) or such of them as should be then living, and it was declared that if any of them should before the conveyance alienate his share, it *should* be forfeited and go to the others; before the happening of the specified event, one of the six executed an assignment of his share, and it was not suggested that the clause against alienation was invalid.

The point has more frequently occurred with regard to personal estate; (*r*) but in no case where the condition has been held good did it aim at restraining alienation of the property after the period of payment or distribution. On principles already stated, a condition *requiring* alienation within a given time is void; *e. g.*, a condition that A and B, tenants in common in fee, shall make partition during their

time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple in possession or remainder against selling for a particular period of time was valid by the common law," and the condition that devisee in fee should not alien for a specified time was there held to be void. A condition that devisee in fee should not convey "until he attain the age of thirty-five years" was held valid in *Stewart v. Brady*, 3 Bush 623, and invalid in *Twitty v. Camp*, Phill. Eq. 61.

[(*p*) 2 Leon. 82, 3 Leon. 182.

(*q*) 2 Dr. & Sm. 117.

(*r*) *Churchill v. Marks*, 1 Coll. 441;

In *re Payne*, 25 Id. 556 (in both of which the bequeathed interest was during the specified period contingent as well as reversionary); *Kiallmark v. Kiallmark*, 26 L. J., Ch. 1; *Pearson v. Dolman*, L. R., 3 Eq. 320. See also *Samuel v. Samuel*, 12 Ch. D. 152; *Graham v. Lee*, 23 Beav. 388 (in both of which the validity of such a condition was unquestioned.) It is said, 1 Coll. 445, that an eminent conveyancer, in answer to a question put to him by the court, stated his opinion to be that a gift to A in fee, with a proviso that if A aliens in B's lifetime, the estate shall shift to B, is valid.

joint lives ; for it is a right incident to their estate to enjoy in undivided shares.] (s)

Conditions restraining alienation by a tenant in tail are also void, as repugnant to his estate, (t) to which a right to bar the entail by means of a fine with proclamations, and the entail and the remainders by suffering a common recovery, Restraints on alienation by tenant in tail invalid. was, before the abolition of these assurances, inseparably incident ; (u) but it was held, that a tenant in tail might be restrained from making a feoffment or levying a fine at common law, *i. e.*, without proclamations, or any other tortious alienation ; and also, it seems, from granting leases under the statute 32 Hen. VIII., c. 28 [or a lease for his own life.] (x) The invalidity of any restraint on the power of a tenant in tail to enlarge his estate into a fee simple, however, being once established, it is of little avail to fetter him even with such conditions as are consistent with his estate, since he may at any time, by barring the entail, emancipate himself from all restrictions annexed to it. At one period, the attempts to restrain the aliening power of a tenant in tail were numerous ; and as it was apparent that it was too late to defeat the estate tail on the suffering of the recovery, since by that act the condition itself was defeated, the next contrivance was to declare the estate to be determined, on the tenant in tail taking any preparatory steps for the purpose, as agreeing or assenting to, or *going about, any act, &c., (y) but which, of course, was equally void on the principle already stated.

One of the latest attempts to interfere indirectly with the power of alienation incidental to an estate tail, occurs in *Mainwaring v. Baxter*, (z) where lands were limited by deed to A. for life, remainder to trustees for one thousand years, Trust to charge lands on alienation by tenant in tail, void. remainder to B. for ninety-nine years, if he should so long live, remainder to trustees during his life, to preserve, &c., remainder to his first and other sons in tail male, with remainders over ; and the trusts of the term of one thousand years were declared to be, to the intent that it should not be in the power of any person to destroy or prevent the estate or benefit of him or them appointed to succeed ; and that

(s) *Shaw v. Ford*, 7 Ch. D. 669.]

(t) *Pierce v. Win*, 1 Vent. 321, Pollex. 435.

(u) 10 Rep. 36, Fea. C. R. 260.

(x) Co. Lit. 223 b.

(y) *Mary Portington's Case*, 10 Rep.

36 ; *Corbet's Case*, 1 Rep. 83 b. ; *Jermyn v. Arscot*, cit. 1 Rep. 85 a ; *Mildmay's Case*, 6 Rep. 40 ; *Foy v. Hynde*, Cro. Jac. 696 ; all stated Fea. C. R. 253, *et seq.*

(z) 5 Ves. 458. The same principle applies to wills.

the trustees, after any contract touching the alienation of the premises, should raise £5000 for the benefit of the person whose estate was so defeated. It was held by Sir R. P. Arden, M. R., that the trusts of term were void, as being inconsistent with the rights of the tenants in tail.

[And an attempt to secure the same object, by imposing on the tenant in tail himself a "trust" to preserve the remainders, is equally ineffectual. As, where a testator devised land to A in tail, on special trust and confidence that, if A should have no issue lawfully begotten, he would do nothing to prevent the remainders from taking effect; and then limited the remainders in default of issue of A. It was held that the "trust" was void. It was not properly a trust (for A was beneficial as well as legal owner in tail), but a clause intended to defeat the estate of the tenant in tail if he barred the remainders; and by no form of words could such a restriction be effectually imposed.] (a)

Here it may be noticed, that an objection is advanced in some of the early cases, and has been adopted by text writers of high reputation, (b) to conditions or provisos which are intended to defeat an estate tail, on the ground that the estate is declared to cease, as if the tenant in tail were dead, not as if he were dead *without issue*; or, as we are told, would be most correct, (c) as if the tenant in tail were dead, and there was a general failure of issue inheritable under the entail. A limitation over in the terms first mentioned is, it is said, contrariant, and on *that account void, inasmuch as it amounts to saying, that the estate shall be determined as it would be in an event which *might* not determine it. But it seems questionable, whether much reliance can at the present day be placed on the objection. The courts would, it is conceived, supply the words "without issue," as in an early case, (d) the principle of which seems not very dissimilar, where a devise to a person in tail, with a limitation over "if he die," was read if he die *without issue*. It is to be observed, too, that in the cases in which the doctrine in question was advanced, (e) the proviso was void on the ground of repug-

Devise in tail on trust not to prevent the remainders, void.

Limitation over as if tenant in tail were dead (not dead *without issue*.)

[(a) *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318, 4 App. Cas. 51. See also *Hood v. Oglander*, 34 Beav. 513, 522.]

(b) Fea. C. R. 253, Harg. & Butl. Co. Lit. 223 b, n. 132, [Sand. Uses, ch. II., § 4, p. 4.]

(c) *Mr. Butler's n. Fea.* C. R. 254.

(d) *Anon.*, 1 And. 33, pl. 84.

(e) *Corbet's Case*, 1 Rep. 83 b; *Jermyn v. Arscot*, cit. Id. 85 a; *Mildmay's Case*, 6 Rep. 40; *Foy v. Hynde*, Cro. Jac. 696.

nancy ; and it is remarkable, that even Mr. Fearne, its strenuous advocate, completely disregarded the point in the opinion given by him on Mr. Heneage's will ; (f) the proviso in which, so far as it respected the sons of the tenant for life, was obnoxious to this objection.

[However in *Bird v. Johnson*, (g) Sir W. P. Wood, V. C., treated the objection as valid, and as being applicable to that case, which was as follows : A testator gave personal property in trust for his daughter for life, and after her death for her children, payable at the age of twenty-one, or at the decease of the daughter, which should last happen, with a proviso, that if any of the legatees should become bankrupt before his share was payable, his interest should "cease and determine as if he were then dead ;" it was held that a child who became bankrupt in the lifetime of his mother did not thereby forfeit his interest, the terms of the condition not fitting to the previous gift. "If," the V. C. said, "the interest given had been an annuity, which would naturally be at an end on the death of the annuitant, such a clause would be operative ; but here it is an absolute interest which is given, and if the donee were dead, the only effect would be to give the fund to his executors or administrators. * * * As to real estate, the old cases have quite settled the law upon this point. With regard to estates tail, it has been decided that it is a condition repugnant, and therefore void if it does not state that the interest is to cease as if the donee were deceased without issue, or without issue heritable under the entail, as the case may be ; for that such a condition would not determine the estate tail."

There is, however, an obvious difference between the case of *an estate tail where the words "as if," &c., may reasonably be understood as pointing to the regular determination of the estate, and where there is no doubt what words are wanting to express that meaning, (h) and the case of a fee simple, or perpetual interest in personalty, of which there is no regular determination, and where it is uncertain what other mode of determination is contemplated. In *Astley v. Earl of Essex*, (i)

(f) Butl. Fea. 616 App.

[(g) 18 Jur. 976. See also *In re Catt's Trusts*, 2 H. & M. 46.

(h) This construction would of course be excluded if a clear intention were expressed that the interest of the defaulting tenant in tail alone should cease, and not that of the heirs of his body. But the intention would fail of effect, since

such a partial defeasance of the estate is not permitted by the law, *Seymour v. Vernon*, 33 L. J., Ch. 690, 10 Jur. (N. S.) 487. See *ante* p. *866, n. (l).

(i) L. R., 18 Eq. 290, 296. In *Jellicoe v. Gardiner*, 11 H. L. Cas. 323, estate X. stood settled in remainder on testator's sons in tail male : the testator devised his own estates to his sons in tail male, re-

where the devise was to A in tail, with a proviso that in a given event his estate should cease and the property devolve as if he were naturally dead, the words "without issue" were (in effect) supplied by Sir G. Jessel, M. R., in order to effect the declared intention that in the case contemplated the estate of A should cease.]

The principle which precludes the imposition of restrictions on the aliening powers of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty. *(k)* It is clear, therefore, that if a legacy were given to a person, his executors, administrators, or assigns, with an injunction not to dispose of it, the restriction would be void; and a gift over, in case of the legatee dying without making any disposition, *(l)* [or of what he should not spend,] *(m)* would also be rejected as a qualification repugnant to the preceding absolute gift. *(l)* [But, as already noticed, *(n)* a prohibition against alienation at any time before the property falls into possession has frequently been upheld.]

Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can *be created by the author of the gift from its liability to the debts of the donee: and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer by operation of law of the whole estate; ²³ and it is imma-

As to restraining alienation by legatee of personalty.

Property cannot be given to a man exempt from the operation of bankruptcy.

mainders to their children in tail *general*; and provided that, if any of his sons, &c., should become entitled to the X. estate, the testator's own estate should shift to the person next in remainder as if the son, &c., so becoming entitled were dead *without issue*. This was read "dead without issue male," so as not to exclude issue female, who were next in remainder, and to whom the X. estate could never devolve.

(k) Co. Lit. 223 a.]

(l) *Bradley v. Peixoto*, 3 Ves. 324; [*Rishton v. Cobb*, 5 My. & C. 153;] *Ross v. Ross*, 1 J. & W. 154; [*Green v. Harvey*, 1 Hare 428; *Watkins v. Williams*, 3 Mac. & G. 622; *In re Yalden*, 1 D., M. & G. 53; *Hughes v. Ellis*, 20 Beav. 193 (as to which *vide ante* p. *15); *In re Mortlock's Trust*, 3 K. & J. 456; *Bowes v. Goslett*, 27 L. J., Ch. 249; *In re Wil-*

cock's Estate, 1 Ch. D. 229. The cases show that repugnancy is the true ground of the decision, and not, as suggested by Lord Truro in *Watkins v. Williams*, the difficulty or impossibility of ascertaining whether any, or what part, of the fund remained undisposed of.

(m) *Henderson v. Cross*, 29 Beav. 216.

(n) *Ante* p. *19.

23. 2 Redf. on Wills 300; *Deering v. Tucker*, 55 Me. 284; *Blackstone Bank v. Davis*, 21 Pick. 42; *Hallet v. Thompson*, 5 Paige 583. This last case was a bequest to A of the income of a fund, "not to be liable to any of his creditors," but the principal was made payable to him on demand, which was held to put the fund within reach of his creditors. So in *Jones' Will*, 23 L. T. R. (N. S., 1870,) 211, a condition annexed to an absolute gift to A that it should go over "if his

terial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest than to an absolute or transmissible property. (o) Whatever remains in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law, in such event, has cast the property.

Thus, in *Brandon v. Robinson*, (p) where a testator, after devising his real and personal property to trustees, upon trust to sell and divide the produce among his children, directed that the share of his son should be invested at interest in the names of the trustees during his life, and that the dividends and interest thereof, as the same became payable, should be paid by them from time to time into his own proper hands, or on his order and receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and, upon his decease, the principal, together with the interest thereof, to be paid and applied to such persons as would be entitled to any personal estate of A's said son, if he had died intestate. The legatee became bankrupt.

On a bill filed by the assignees against the trustees of the will, to have the benefit of the bequest, the latter demurred. It was argued for the defendants, that it could not be disputed that a testator might limit a personal benefit strictly, excluding any assignee either by actual assignment or operation of law. He might limit the enjoyment up to a particular period or event, and then to be forfeited or transferred to some other person. If the testator has a right so to limit, he may direct the trustees, who are to take the absolute legal interest, to dispose of it from time to time in a particular manner, to pay into the hands of the legatee personally from time to time, and to no other. Such a disposition, it was contended, is not opposed by any principle of law or public policy. The son acquires nothing until each payment be-

share shall become liable to be seized by his creditors, or if he shall become bankrupt, or shall alien or mortgage the same," was held repugnant to the gift and void. Gifts, however, limited to cease upon bankruptcy, are held valid, see note 25, *infra*. But in *Pace v. Pace*, 73 N. C. 119, a bequest in trust for A,

not to be subject to her disposal or debts, was discharged from the restriction, there being no limitation over.

[(o) *Brandon v. Robinson*, 18 Ves. 429, 1 Rose 197; *Graves v. Dolphin*, 1 Sim. 66; *Rochford v. Hackman*, 9 Hare 475; all referred to *post*.]

(p) 18 Ves. 429, 1 Rose 197.

comes due. When he actually receives, and then only, the trust is executed; and the effect of a decision, that the *payment is to be made not to him personally, but to others, who by representation are become at law entitled to his rights, would be making another will for the testator. It was contended for the assignees, that this case was not to be distinguished from the case of a lease with a proviso not to assign without license, which would pass by the assignment under a commission of bankruptcy, or might be sold under an execution. The volun-

Life interest
may be made
to cease on
bankruptcy.

tary act is restrained, but not the act of law *in invitum*.

Lord Eldon, C., "There is no doubt that property may

be given to a man until he shall become bankrupt: it is equally clear, generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not *sell* or *alien* it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. In the case of *Foley v. Burnell*, (q) this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley, with a view of depriving the creditors of his sons of any resort to their property. But it was argued here, and, as I thought, admitted, that if the property were given by Lord Foley to his sons, *it must remain subject to the incidents of property*, and it could not be preserved from the creditors, unless given to some one else.

"So the old way of expressing a trust for a married woman ²⁴ was,

(q) 1 B. C. C. 274.

24. The whole subject of trusts for the separate use of married women is fully discussed in the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, and the English and American notes and cases cited in 1 *White & Tudor's L. C. Eq.* (4th Am. ed., 1876,) 679-772. See also *Bispham's Eq.* (2d ed.), § 104; *Perry on Trusts*, §§ 388, 555, 670; *Tiffany on Trusts* 683; *Hill on Trustees* 395. In the following cases it has been held that the alienation by a *feme covert* of her interest in trust estates held for her separate use may be restrained by clear words: *Perkins v.*

Hays, 3 Gray 405; *Nixon v. Rose*, 12 Gratt. 425; *Weeks v. Sego*, 9 Ga. 201; *Fears v. Brooks*, 12 Ga. 197; *Roberts v. West*, 15 Ga. 123; *Freeman v. Flood*, 16 Ga. 528; *contra*, *Nix v. Bradley*, 6 Rich. Eq. 43. In Pennsylvania the cases hold that such trust can only be created in contemplation of marriage, and ends with the coverture: *Smith v. Starr*, 3 Whart. 62; *Hamersley v. Smith*, 4 Whart. 126; *Bush's Appeal*, 33 Penna. St. 85; *McKee v. McKinley*, 33 Penna. St. 92; *McBride v. Smyth*, 54 Penna. St. 245; *Freyvogel v. Hughes*, 56 Penna. St. 228; *Wells v. McCall*, 64 Penna. St. 207; *Springer v.*

that the trustee should pay into her own proper hands, and upon her own receipt only, (*r*) yet this court always *said she might dispose of

Arundel, 64 Penna. St. 218; Ogden's Appeal, 70 Penna. St. 501; Ashhurst's Appeal, 77 Penna. St. 464.

What words create a trust for separate use.—(*r*) What words create a trust for separate use, has often been a subject of dispute. [The principle of construction is stated to be, that the marital right is not to be excluded, except by expressions which leave no doubt of the intention; 5 Ves. 521; 9 Id. 377; 1 Mad. 207; 2 R. & My. 188; 2 My. & K. 181, 188. But in *Willis v. Kymer*, 7 Ch. D. 181, a precatory trust for children, *simpliciter*, was held by Jessel, M. R., to authorize the trustee to add a trust for separate use; as if the trust had been executory.]

"To be at her own disposal."—In *Kirk v. Paulin*, at the Rolls (1737), 7 Vin. Abr. 95, pl. 43, A bequeathed household goods, &c., to his daughter B, then the wife of C, *to be at her own disposal*, and to do therewith as she should think fit: the bequest was held to be for her separate use. See also *Prichard v. Ames*, T. & R. 222.

"For the livelihood" of the wife.—In *Darley v. Darley*, 3 Atk. 399, Lord Hardwicke ruled that an estate given to the husband *for the livelihood* of the wife created a trust for her separate use. [But assuming the report to be correct, this may have depended on the husband being sole trustee (as to which *vid. inf.*): in the case itself a leasehold estate was conveyed to the wife direct, and the decision was the reverse of the *dictum*, see n. by Sanders 3 Atk. 399, and per Arden, M. R., 3 B. C. C. 383. In *Packwood v. Maddison*, 1 S. & St. 232, Leach, V. C., said, that by a gift "for the support" of a *feme covert* a trust for her separate use was not created. And see *Gilchrist v. Cator*, 1 De G. & S. 188; and per Hall, V. C., *Austin v. Austin*, 4 Ch. D. 236. In *Cape v. Cape*, 2 Y. & C. 543, a gift by

codicil for the support and maintenance of the wife of A was held to be for her separate use, probably because the will had contained a bequest of the same fund to A himself, which was expressly revoked by the codicil.]

Receipt to be a discharge.—In *Lee v. Priaux*, 3 B. C. C. 381, the trust, in a will, was to pay certain dividends to A, but the trustee was not to "be troubled to see to the application of any sum or sums paid to the said A, *but her receipt in writing should be a sufficient discharge*" to the trustee for the sums so paid. Arden, M. R., was of opinion, that the words were sufficient to give an absolute power to the wife independently of her husband.

Direction to deliver legacy on the demand of the feme legatee.—In *Dixon v. Olmius*, 2 Cox 414, a bequest to the testator's niece, Lady W., of certain securities owing from Lord W., with a direction that they should be delivered up to her whenever she should demand or require the same, was held, by Lord Loughborough, to be a gift to her separate use; because Lord W. could not have obtained them from the executors without a demand made by Lady W. The same principle evidently applies to a direction that a *feme legatee* shall not sell without her husband's consent, *Johnes v. Lockhart*, 3 B. C. C. 383, n., Belt's ed.

"To pay into the proper hands."—In *Hartley v. Hurle*, 5 Ves. 540, Arden, M. R., held, that a trust to pay income *into the proper hands* of A was a trust for separate use. But in *Tyler v. Lake*, 4 Sim. 144, Shadwell, V. C., made a contrary decision on the same words. There was a similar gift to a male legatee in the same will; but his Honor seems not to have wholly relied on this circumstance: and the decision was affirmed by Lord Brougham, 2 R. & My. 183, [and reluctantly followed by Wigram, V. C., in

that interest, and her assignee would take it; as if there was a contract entitling the assignee, this *court would compel her to give her own

Blacklow v. Laws, 2 Hare 49 (where the trust was "to pay an annuity into the proper hands of A for her own proper use and benefit.") See also *Rycroft v. Christy*, 3 Beav. 238. But a gift in trust for a woman, she "to receive the rents herself while she lives, whether married or single," with a clause forbidding a sale or mortgage during her life, was, in *Goulder v. Camm*, 1 D., F. & J. 146, held to create a trust for her separate use.]

Mere trust for married woman not sufficient to create separate property.

—Of course, a trust or direction to pay the rents or income of property, real or personal, simply to a married woman for life creates no trust for her separate use, *Brown v. Clark*, 3 Ves. 166; *Lumb v. Milnes*, 5 Ves. 517; [*Jacobs v. Amyatt*, 1 Mad. 376, n.] "Own use and benefit." —And the addition of the words "for her own use and benefit" has been repeatedly held not to vary the construction, *Wills v. Sayer*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; [*Beales v. Spencer*, 2 Y. & C. C. 651; and in *Taylor v. Stainton*, 2 Jur. (N. S.) 634, it was admitted that a residuary bequest to a married woman "for her own proper use and benefit," did not create a separate trust.

"Sole" is *prima facie* not equivalent to "separate."—"Separate" is the proper technical word for excluding the marital right: "sole" is not equivalent; and *prima facie* a devise or bequest direct to a single woman (including the testator's widow) for her sole use will not create a separate use, *Gilbert v. Lewis*, 1 D., J. & S. 38; *Lewis v. Mathews*, L. R., 2 Eq. 177. Nor will the mere circumstance that the property is vested in trustees, as where all the testator's estate is given to trustees for the general purposes of the will, affect the result, *Massy v. Rowen*, L. R., 4 H. L. 288. It is a question of construction on the whole will in each case;

and where the machinery of a trust was created for the special benefit of a married woman, (*Green v. Britten*, 1 D., J. & S. 649,) and of a single woman for whose possible marriage the testator was providing, (*In re Tarsey's Trusts*, L. R., 1 Eq. 561,) a trust for the sole use was held to exclude the husband. In *In re Tarsey's Trusts* the allusion to marriage was not in connection with the very legacy upon which the question arose, but with another given by the same will distinctly for the same legatee's separate use; and the exclusion of the husband from one fund by clear words was considered to increase the probability that by the use of the word "sole" it was intended to exclude him from the other (see also L. R., 4 H. L., 302): *a fortiori*, where one bequest was to be enjoyed together with the other, as a house with its furniture, *Ex parte Killick*, 3 M., D. & D. 480.

Distinction between income and corpus as regards the word "sole."—Income being more commonly devoted to separate use than corpus, (and in *Troutbeck v. Boughey*, L. R., 2 Eq. 534, the separate use was held upon the construction of the will to attach on the income only, although the woman was devisee in fee,) "sole" may more readily be understood as intended to annex such a use to income than to corpus, per Lord Cairns, L. R., 4 H. L. 301; and see *Adamson v. Armitage*, Coop. 283, 19 Ves. 416 (where there was also a special trust created); *Inglefield v. Coghlan*, 2 Coll. 247. But] if a testator after directing that the [income] bequeathed to females shall be "under their sole control," (words which standing alone would clearly exclude the marital right,) show by the context that the expression has reference to the possible control of some person other than the husband, the words will be inoperative to modify the interest, *Massey v. Parker*, 2

receipt, if that was necessary to enable him to receive it. It was not before Miss *Watson's Case that these words, 'not to be paid by

My. & K. 174. [Ex parte Ray, 1 Mad. 199, where, in default of children, the trust of *corpus* was for the sole use, benefit and disposition of a woman, arose on her marriage settlement; so that an intention to exclude the husband might be readily inferred from the nature of the instrument. But some *dicta* in this and other cases previous to *Gilbert v. Lewis*, especially in *Ex parte Killick*, ascribe greater force to the word "sole" than is consistent with late cases; with which also *Cox v. Lyne*, Young 562, and *Lindsell v. Thacker*, 12 Sim. 178, are difficult to reconcile.]

Extrinsic circumstances not to be regarded.—The construction is wholly uninfluenced by any extrinsic circumstances in the situation of the *cestui que trust*, which might seem to render a trust of this nature reasonable or convenient, as that of her being indigent, or living separately from her husband, or both, *Palmer v. Trevor*, 1 Vern. 261, Raithby's ed.; [unless the circumstances are expressly referred to in the will, as where "in case husband and wife should not at testator's death be living together," the bequest was to the wife "absolutely," *Shewell v. Dwaris*, Joh. 172. But] the fact of the husband being *one* of the trustees, *Kensington v. Dollond*, 2 My. & K. 184, or even that of the prior trust being for him determinable on bankruptcy, &c., [the trust in that event being simply to pay "unto" the wife,] *Stanton v. Hall*, 2 R. & My. 175, does not afford ground for inferring a separate trust. [If the husband be made sole trustee the inference might be stronger, per *Leach*, V. C., *Ex parte Beilby*, 1 Gl. & J. 167.]

"Independent of any other person."—Where the gift was to A and B, (one a married woman, and the other her infant daughter,) to be equally divided between them, "for their own use and benefit, in-

dependent of any other person," it was held, that these words meant "*independent of*" all mankind, and, therefore, included the husband, *Margetts v. Barringer*, 7 Sim. 482. [But a general exclusion of all, was by Lord Hatherley, L. R., 4 H. L. 298, distinguished from the particular exclusion of a husband.]

In *Wardle v. Claxton*, 9 Sim. 524, a direction to trustees to pay the interest to the testator's wife, to be by her applied for the maintenance of herself and her children, was held not to create a trust for separate use; [the words "to be applied," &c., referring not only to the widow, but to all the children. But this circumstance will not control the force of a clear trust for separate use, *Bain v. Lescher*, 11 Sim. 397; for, as K. Bruce, V. C., said, (2 Coll. 421,) "a case might arise in which the words 'sole use' applied to a class of men and women, might not be held indiscriminately applicable to each." See also *Froggatt v. Wardell*, 3 De G. & S. 685.]

Where a trust for separate use is created, but no trustee is appointed, the husband becomes a trustee for his wife, *Bennett v. Davis*, 2 P. W. 316; [see also 9 Ves. 375, 583. The point had been doubted by Lord Cowper in *Harvey v. Harvey*, 1 P. W. 125.]

What amounts to a restraint on anticipation by a feme covert.—To the complete efficiency of a trust for separate use, a restraint on the anticipation of future income is essential as a protection against marital influence. Hence, to ascertain by what terms a restrictive provision of this nature may be created is a point of much importance. [The intention must be clear; and therefore a direction to pay the income *from time to time*, or as it shall become due, or into the *proper hands* of the *feme covert*, *Pybus v. Smith*, 3 B. C. C. 340, 1 Ves., Jr., 189; *Parkes v. White*, 11 Ves. 222; *Acton v. White*, 1 S. & St. 429; *Glyn v.*

anticipation,' &c., were introduced. I believe they were Lord Thurlow's own words, with whom I had much conversation upon it. He

Baster, 1 Y. & J. 329; or even upon her personal appearance and receipt, *Ross' Trust*, 1 Sim. (N. S.) 196; cf. *Arden v. Goodacre*, 11 C. B. 883; will not take away the power of anticipation. In *Alexander v. Young*, 6 Hare 393, the principle was carried to its full extent, *Wigram, V. C.*, holding that a trust for the separate use of a married woman for her life; and after her death, as she should appoint, *but no appointment by deed to come into operation until after her death*, did not forbid anticipation.

But no technical form of words is necessary. In *Field v. Evans*, 15 Sim. 375, *Shadwell, V. C.*, decided that, under a trust for the separate use of a married woman, and a declaration that the receipts of herself or the persons to whom she should appoint the income, *after the same should become due*, should be effectual, she was restrained from anticipating. See also *Baker v. Bradley*, 7 D., M. & G. 597. In *Steedman v. Poole*, 6 Hare 193, a gift of property for the separate use of a *feme covert*, "and not to be sold or mortgaged," was similarly construed; and under a bequest to children, "the girls' shares to be settled on themselves strictly," it was held, that a trust for separate use without power of anticipation was created, *Loch v. Bagley*, L. R., 4 Eq. 122. In *Brown v. Bamford*, 1 Phill. 260, it was decided by Lord Lyndhurst (reversing 11 Sim. 127), that a bequest in trust to pay the income to such persons as a married woman should appoint, but not by way of anticipation, and in default of appointment, into her proper hands for her separate use, created a valid restraint against anticipation, extending not only to the express power but to the trust in default of appointment. So *Moore v. Moore*, 1 Coll. 54; *Harnett v. M'Dougall*, 8 Beav. 187; *Spring v. Pride*, 4 D., J. & S. 395.

Where the inheritance of land or the *corpus* of an income-producing fund is settled to the separate use, with a restraint on anticipation, the property cannot be alienated by any act during coverture, *Baggett v. Meux*, 1 Coll. 138, 1 Phill. 627; In re *Ellis' Trusts*, L. R., 17 Eq. 409; at least, not without a reservation of the income during coverture, see per *Jessel, M. R.*, *Cooper v. Macdonald*, 7 Ch. D. 288, 298. During the coverture the *feme covert* can only have the income paid to her, *Baggett v. Meux*, In re *Ellis' Trusts*, *sup.* But she may bar an entail in land so settled and dispose of it by will executed during coverture, *Cooper v. Macdonald*, *sup.* Where there were gifts to several married women, including a gift to one of them of a fund not producing income, and the will contained a general clause providing that all gifts to married women should be for their separate use without power of anticipation, and that their sole receipts should be sufficient, it was held by *Bacon, V. C.*, that the restraint was inapplicable to the fund which was not producing income, and that the *corpus* was payable to the *feme covert* during coverture, In re *Croughton's Trusts*, 8 Ch. D. 460, and see *Armitage v. Coates*, 35 Beav. 1. But where the restraint is annexed specifically to the particular fund, this construction cannot be adopted, and the *feme covert* will be entitled to the income only during coverture, In re *Sarel*, 10 Jur. (N. S.) 876, 4 N. R. 321; In re *Gaskell's Trusts*, 11 Jur. (N. S.) 780; as to In re *Sykes' Trusts*, 2 J. & H. 415, see L. R., 17 Eq. 411; and as to whether a restraint on "alienation" would be effectual as regards a barren fund where a restraint on "anticipation" would not, *qu.*; *Bacon, V. C.*, rejected the distinction, 8 Ch. D. 463.

With the ordinary proviso against an-

did not attempt to take away any power the law gave her as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavored to prevent that, by imposing upon the trustees the necessity of paying her from time to time, and not by anticipation, reasoning thus; that equity making her the owner of it, and enabling her as a *married woman* to alien, might limit her power over it; *but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.* This is a singular trust. If upon these words it can be established that he had no interest until he tenders himself personally to the trustees to give a receipt, then it was not his property till then; but if personal receipt is in the construction of **this court* a necessary act, it is very difficult to maintain, that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so. Next, is there in this will evidence to show, that as the interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? *To prevent that it must be given to some one else; (s)* and, unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest capable of being parted with. The principal at the death of the bankrupt will be under very different circumstances. The testator had a right to limit his interest to his life, giving the principal to such person as may be his next of kin at his death, to take it as the personal estate not of the son, but of him the testator, not as if it was the son's personal estate, but as the gift of the testator. The demurrer must, upon the whole, be overruled."

So in *Graves v. Dolphin*, (*t*) where a testator directed trustees to pay an annuity of £500 to his son I. for his life, and declared that it was intended for his personal maintenance and support; and should not, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges, or encumbrances of his said son, but that the same should, as it became payable, be paid over into the proper hands of him, the testator's said son, and

Assignees in bankruptcy entitled to benefit of trust for maintenance.

icipation, income accruing *de die in diem*, but not yet actually payable, cannot be dealt with, *In re Brett*, 1 D., J. & S. 79; but overdue arrears are not protected,

Pemberton v. M'Gill, 1 Dr. & Sm. 266.]

[(*s*) As to this, *vide post* p. *37.]

(*t*) 1 Sim. 66.

not to any other person or persons whomsoever; and the receipts of the son only were to be sufficient discharges. The son became bankrupt, and it was held by Sir J. Leach, V. C., that the annuity belonged to his assignees.

And the vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a *cestui que trust*, Notwithstanding trustees have a discretion as to mode of application. does not take it out of the operation of bankruptcy or insolvency; to effect which the discretion of the trustees must extend, not merely to the manner of applying the income for the benefit of the *cestui que trust*, but also to the enabling of them to apply it either for his benefit, or for some other purpose.

Thus, in *Green v. Spicer*, (u) where a testator devised certain estates to trustees, upon trust to pay and apply the rents and profits to or for the board, lodging, maintenance, and support and benefit of his son R., at such times and in such manner as *they should think proper, for his life: it being the testator's wish, that the application of the rents and profits, for the benefit of his said son, might be at the entire discretion of the said trustees; and that his son should not have any power to sell or mortgage or anticipate in any way the same rents and profits. R. took the benefit of an insolvent act, whereupon his interest was claimed by the assignee. Sir J. Leach, M. R., held the assignee to be entitled, on the ground that the insolvent was the sole and exclusive object of the trust. The trustees were bound, he said, to apply the rents for the benefit of R., and their discretion applied only to the manner of their application.

So in *Snowden v. Dales*, (x) where A vested a money fund in trustees, in trust during the life of B, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times and in such sum or sums as they should judge proper, to allow and pay the interest into the proper hands of B, or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessities; but so that he should not have any right, title, claim, or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper or expedient; and so as no creditor of his should or might have any lien or claim thereon,

Title of assignees in bankruptcy not excluded by discretion seemingly given to trustees.

(u) 1 R. & My. 395, Taml. 396.

Roberts, 1 My. & K. 4; Younghusband

(x) 6 Sim. 524. [See also *Piercy v. v. Gisborne*, 1 Coll. 400.

or the same be in any way subject or liable to his debts, dispositions, or engagements; with a direction that a proportionate part of the interest should be paid up to the decease of B; and after his decease the fund, and all savings and accumulations, should be in trust for his children, &c. B became bankrupt. Sir L. Shadwell, V. C., held, that the assignees were entitled to the life interest; for he thought there was no discretion to withhold and accumulate any portion of the interest during the life.

[But in *Twopeny v. Peyton*, (y) where the trustees had a discretion to apply *the whole or such part* of the income as they should think fit, for the maintenance and support of the *cestui que trust*, who (the testatrix recited) had become a bankrupt and insane, and for no other purpose whatsoever; Sir L. Shadwell, V. C., held, that the assignees took no interest. It may be doubted, however, whether the trustees had power to withhold the whole income from the bankrupt.

Exception upon special terms of the trust.

* If the trusts of the property be declared in favor of several, as a man, his wife and children, to be applied for their benefit, at the discretion of the trustees, the man's assignees, in case of his bankruptcy, are entitled to as much of the fund as he would himself have been separately entitled to, after providing for the maintenance of the wife and children. (z) But if he was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children, then his assignees have no claim. (a) And where the trustees of a settlement had a discretionary power of excluding any of the objects of the trust, their power was held to continue after the insolvency of one of such objects. (b) It was said, however, that any benefit which the insolvent might take would belong to his assignees. (c) And if the trustees decline (as by paying the fund into court) to exercise their power of exclusion,

Assignees entitled to bankrupt's undivided share,

—except in special cases.

Assignees may be excluded where the trustees have a discretion to exclude the bankrupt.

(y) 10 Sim. 487. The bankrupt was uncertificated, so that this property was liable. See also *Yarnold v. Moorhouse*, 1 R. & My. 364, stated *post*.

(z) *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185; *Rippon v. Norton*, 2 Beav. 63; *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Wallace v. Anderson*, 16 Beav. 533. Some of these cases arose on deeds, but the same principles seem to

apply to wills.

(a) *Godden v. Crowhurst*, 10 Sim. 642. The principle for which this case is cited is recognized in *Kearsley v. Woodcock*, 3 Hare 185; but the decision itself has been questioned; see *Younghusband v. Gisborne*, 1 Coll. 400.

(b) *Lord v. Bunn*, 2 Y. & C. C. C. 98.

(c) Per Sir K. Bruce, V. C., *Ib*.

the power is gone, and the assignees are entitled to the whole or an aliquot portion of the fund, according as the bankrupt was the only *cestui que trust* or not.](d)

But though a testator is not allowed to vest in the object of his bounty an inalienable interest exempt from the operation of bankruptcy; yet there is no principle of law which forbids his giving a life interest in real or personal property, with a proviso, making it to cease on such event: 25 for whatever

Life interest
may be made
to cease on
bankruptcy.

(d) In re Coe's Trust, 4 K. & J. 199.]

25. Bramhall v. Ferris, 14 N. Y. 41; Nichols v. Eaton, 1 Otto 716; Heath v. Bishop, 4 Rich. Eq. 46. So in Billson v. Crofts, 15 L. R., Eq. 314 (1872), a gift "until he shall become bankrupt or insolvent" was forfeited by a composition deed reciting his insolvency; so in Ex parte Eyston, 37 L. T. R. (N. S., 1877,) 447, 26 W. R. 181, an annuity with clause of forfeiture "if he do or permit any act whereby the same shall be charged, aliened or encumbered," was forfeited by the annuitant's bankruptcy; so Aylwin's Trusts, 16 L. R., Eq. 585, (1873.) But a provision in a bond making it payable upon the obligor's bankruptcy has been held void in Ex parte Baddam, 2 De G., F. & J. 625, (1860.) And the same thing is accomplished by a trust for the support or benefit of the debtor only, with or without words excluding creditors. Such trusts have been upheld as valid against creditors in the following, among other cases: White v. White, 30 Vt. 338; Leavitt v. Beirne, 21 Conn. 1; Easterly v. Keney, 36 Conn. 18; Clute v. Bool, 8 Paige 83, (in this case creditors were allowed to reach the surplus not needed by the debtor for his support); Campbell v. Foster, 35 N. Y. 361; Frazier v. Barnum, 4 C. E. Gr. (N. J.) 316; Fisher v. Taylor, 2 Rawle 33; Shankland's Appeal, 47 Penna. St. 113; Keyser's Appeal, 57 Penna. St. 236; Rife v. Geyer, 59 Penna. St. 393; Pope v. Elliott, 8 B. Mon. 56; Fellows v. Tann; 9 Ala. 999; Spears v. Walkley, 10 Ala. 328; Rugely

v. Robinson, 10 Ala. 702; Hill v. McRae, 27 Ala. 175; but, *contra*, in later Alabama cases under the code, see Robertson v. Johnston, 36 Ala. 197; Smith v. Moore, 37 Ala. 327; Wylie v. White, 10 Rich. Eq. 294; especially if the trust is created for the support of the debtor or his family, and is not excessive in amount, Braman v. Stiles, 2 Pick. 463; Genet v. Beekman, 45 Barb. 382; Holdship v. Patterson, 7 Watts 547; Ashhurst v. Given, 5 Watts & S. 323; Vaux v. Parke, 7 Watts & S. 19; Norris v. Johnston, 5 Barr (Pa.) 287; Eyrick v. Hetrick, 13 Penna. St. 488; Brown v. Williamson, 36 Penna. St. 338; Rees v. Livingston, 41 Penna. St. 113; Still v. Spear, 45 Penna. St. 168; Girard Life Ins. v. Chambers, 46 Penna. St. 485; Keyser v. Mitchell, 67 Penna. St. 473; Markham v. Guenant, 4 Leigh 279; Nickell v. Handley, 10 Gratt. 336; Johnston v. Zane, 11 Gratt. 570. In Girard Life Ins. v. Chambers (above cited), it was held that the reservation from creditors must be express; so McIlvaine v. Smith, 42 Mo. 45; in Hutchins v. Heywood, 50 N. H. 491, the debtor's interest as *cestui que trust* was held to be within reach of attachment and execution. In the language of Justice Swayne, in Nichols v. Levy, 5 Wall. 441, "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary

objection there may be to allowing a person to modify his own property, in such manner as to be divested on bankruptcy or insolvency, (e) it seems impossible, on any sound principle, to deny to a third person the power of shifting the subject of his bounty to another, when it can no longer be enjoyed by its intended object. The validity of such provisions was established in the early case of *Lockyer v. Savage*, (f) where £4000 was settled by the father of a *feme covert*, for the use of the husband for life, with a direction that *if he failed in the world*, the trustees should pay the produce to *the separate maintenance of his wife and children; and the latter trust was held to be good.

Indeed, this principle is now so well settled, that the only point on which any doubt can arise, is whether the clause is so framed as to apply to bankruptcy, which we shall see has often been a subject of controversy.

It appears that bankruptcy is a forfeiture, under a proviso prohibiting alienation, if the terms of such proviso extend to alienations by operation of law, as well as those produced by the act of the devisee; bankruptcy being regarded as an alienation of the former kind.

Thus, in *Dommett v. Bedford*, (g) where a testator, after giving an annuity, charged on real estate, to A for life, directed that it should from time to time be paid *to himself only*, and that a receipt under his own hand, and no other, should be a sufficient discharge for the payment thereof; the testator's intent being that the said annuity, or any part thereof, should *not on any*

Where bankruptcy is a forfeiture under a clause restraining alienation.

and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid and a condition subsequent that it shall be divested and forfeited by his insolvency with a limitation over to another person are valid and the law will give them full effect. Beyond this protection from the claims of creditors is not allowed to go." See also 2 Redf. on Wills 300; *Bispham's Eq.*, § 61. In many of the states, statute provides for reaching such trust funds by creditor's bill, where they proceed from the debtor himself or arise by his act. But it appears to be established by American decisions that courts of equity will not interfere in behalf of a man's creditors with funds held in trust for him pro-

ceeding from some third person, making provision for the maintenance of the debtor.

[(e) As to this, see *Wilson v. Greenwood*, 1 Sw. 481; *Ex parte Mackey*, L. R., 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138.]

(f) 2 Stra. 947. This case (among many others) shows that there is not (as sometimes contended) any real distinction between a trust for A until bankruptcy and a trust for A for life, with a proviso determining the life interest on bankruptcy; each is equally valid. [Of course clauses of this nature do not affect arrears of income, *In re Stulz's Trusts*, 4 D., M. & G. 404.]

(g) 3 Ves. 149, 6 T. R. 684.

account be alienated for the whole term of his life, or for any part of the said term; and, *if so alienated, the said annuity should cease*. A having become bankrupt, it was held that the annuity had determined.

So in *Cooper v. Wyatt*, (*h*) where the overplus of the rents of a moiety of the testator's real estate was directed to be paid into the hands of S., *but not to his assigns*, for the term of his natural life, for his *own sole* use and benefit, with a limitation over if the devisee should, by any ways or means whatsoever, *sell, dispose of, or encumber*, the right, benefit, or advantage, he might have for life, or any part thereof: Sir J. Leach, V. C., held that bankruptcy was a forfeiture; considering that the expressions of the testator denoted that the devisee's interest was to cease when the property could be no longer personally enjoyed by him.

On the other hand, in *Wilkinson v. Wilkinson*, (*i*) where a testator, after giving certain annuities and other life interests to several persons, provided that in case they should "*respectively assign or dispose of or otherwise charge or encumber* the life estates, the annuities, and provisions so made to and for them during their respective lives as aforesaid, *so as not to be entitled to the personal receipt, use and enjoyment thereof*"; then the annuity, life estate, or interest, of him, her, or their heirs respectively, (*k*) so **doing, or attempting so to do,*" should cease, and should immediately thereupon devolve upon the persons who should be next entitled thereto. Sir W. Grant, M. R., was of opinion, that the testator had not with sufficient clearness expressed an intention that the life estate, which he had given to his son, should cease upon bankruptcy.

So in *Lear v. Leggett*, (*l*) where a testator, after bequeathing to his son and daughters the dividends of certain stock for their respective lives, declared, that their provisions should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt. And in case they, or any or either of them, should charge or attempt to charge, affect, or encumber the same, or any part or parts thereof respectively, then such mortgage, sale or other disposition, or encumbrance so to be made by them, or any or either of them, on his, her or their interest, should operate as a complete forfeiture thereof, and the same should devolve

(*h*) 5 Mad. 482.

(*i*) Coop. 259, 3 Sw. 515, see 528.

(*k*) *Sic.* orig. as reported.

(*l*) 2 Sim. 479, 1 R. & My. 690 See also *Whitfield v. Prickett*, 2 Kee. 608; [*Graham v. Lee*, 23 Beav. 391.]

as if he, she, or they were then dead. The son became bankrupt, and Sir L. Shadwell, V. C., decided that the bankruptcy was not a forfeiture. He observed, that the words declaring that the gift should not be subject to any alienation or disposition, did not create any forfeiture. And the subsequent words referred to a voluntary alienation only, and bankruptcy was not such. He commented on the difference of the language of the clause here, and in *Cooper v. Wyatt*, (m) the authority of which had been much pressed on the court. Lord Lyndhurst, C., affirmed the decree of the V. C., observing, that the prohibition in *Dommatt v. Bedford*, (n) was expressed in much more general and comprehensive terms than in the case before him, and might well be construed to extend to alienations by act of law.

Where the language of a clause restrictive of alienation does not extend to an alienation *in invitum*, it seems that the seizure of the property under a judicial process sued out against the devisee or legatee does not occasion a forfeiture.

Thus in *Rex v. Robinson*, (n) where an annuity of £400 was bequeathed to W. as an unalienable provision for his personal use and benefit, for his life, and not otherwise; and so that the same annuity, or any part thereof, should not be subject or liable to be alienated, or be or become in any manner liable to *his debts, control, or engagements; and the annuity was made to cease in case W. should "at any time sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate," the annuity or any part thereof, or should "make, do, execute, or cause or procure to be made, done and executed, any act, deed, matter or thing whatsoever, to charge, alienate or affect, the said annuity," or any part thereof. A creditor of the legatee sued him to outlawry. Macdonald, C. B., held, on the authority of *Dommatt v. Bedford* (o) and *Doe d. Mitchinson v. Carter*, (p) that the seizure of the

Sale under process of outlawry held no forfeiture, clause requiring positive act.

(m) *Ante* p. *31.

(n) *Wightw.* 386.

(o) 6 T. R. 684, *ante* p. *31.

(p) 8 T. R. 57. A lessee having covenanted not to let, set, assign, transfer or make over, &c., the indenture of lease, a warrant of attorney to confess judgment, given without any special intent to evade the restriction on alienation, [was held not to create a forfeiture under a proviso for re-entry on breach of any covenant.

It afterwards appeared that] the warrant of attorney was given for the express purpose of enabling the creditor to take the lease in execution, and this was held (8 T. R. 300) to be a fraud on the covenant, and to enable the landlord to recover in ejectment. Lord Kenyon said, "If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but here the tenant

annuity under the outlawry, at the suit of the crown, arising merely from the negative, and not the positive acts of the party, was *not* a forfeiture on the words of the bequest, which required a positive act. He considered the words, in the present case, were not so large as in *Dommett v. Bedford*, but were more conformable to those in *Doe v. Carter*.

These cases show that when it is intended to take away a benefit as soon as it cannot be personally enjoyed by the devisee, it should be made to cease on alienation, not only by his own acts, but by operation of law. [To "do or suffer," (g) or to "do or permit," (r) any act causing alienation, has been held to include an act done *in invitum*.]

It seems that formerly taking the benefit of an insolvent act might be an alienation, when bankruptcy would not, as it required certain acts on the part of the insolvent, (viz., the filing of a petition, schedule, &c.,) constituting it a voluntary alienation, as distinguished from a bankruptcy, which partook more of the nature of a compulsory measure.

As in *Shee v. Hale*, (s) where a testator gave real and personal estate to trustees, upon trust to pay to his son J. M. the *yearly sum of £200 during his natural life, or until he should sign any instrument whereby he should contract to sell, assign, or otherwise part with the same, or any part thereof, or in any way charge the same as a security, or in any other manner dispose of such annuity by anticipation, or whereby he should authorize, or intend to authorize, any person or persons, to receive the same, except only as to the then next quarterly payment. And the testator declared that, in case his said son should at any time sign or execute any instrument or writing for any of the purposes aforesaid, then the annuity should cease. The testator's son took the benefit of an insolvent act; and this Sir W. Grant held to be a forfeiture, *being an act authorizing others to receive the annuity*. It differed, he said, from the case of a bankrupt. The insolvent debtor

concurrent throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor." [This distinction was recognized in *Doe v. Hawkes*, 2 East 481, and *Avison v. Holmes*, 1 J. & H. 530. See also *Seymour v. Lucas*, 1 Dr. & Sm. 177. And as to contrivances

to evade such a clause, see *Oldham v. Oldham*, L. R., 3 Eq. 404.

(g) *Roffey v. Bent*, L. R., 3 Eq. 759. See also *Montefiore v. Behrens*, 35 Beav. 95; *Dixon v. Rowe*, W. N. 1876, p. 266 (sequestration.)

(r) *Ex parte Eyston*, 7 Ch. D. 145.]

(s) 13 Ves. 404.

was not in a situation to be compelled to part with the annuity; he might have enjoyed it for his life; the signing of the petition and schedule were clear acts. (*t*)

[So in *Brandon v. Aston*, (*u*) where a testator bequeathed to trustees an annuity of £50 upon trust, during the life of his nephew J. N., to pay the same to him when and as the same should become due for his own use and benefit. And the testator declared that J. N. should have no power to sell, mortgage, encumber, or anticipate the payment of the said annuity; and in case he should attempt so to do, the same should cease, and be no longer payable to him; with a gift over upon the death of J. N., or any such attempt by him to sell, &c. The nephew took the benefit of the insolvent act, and Sir J. K. Bruce, V. C., held that there had been a clear attempt to encumber or anticipate payment of the annuity.

And in *Churchill v. Marks*, (*x*) the same judge held that taking the benefit of an insolvent act was a forfeiture of property bequeathed to the insolvent, subject to a proviso that he should not be "allowed, or sell, or part with," his share in the money till it should be divided; with a gift over in case of non-compliance. (*y*)

And a petition by the debtor himself for adjudication under *the bankruptcy act, 1861, (*z*) or for liquidation under the bankruptcy act, 1869, (*a*) are voluntary acts, no less than taking the benefit of an insolvent act formerly was, and equally productive of forfeiture under clauses prohibiting such acts.]

So, bankruptcy on debtor's own petition.

Sometimes the question arises, whether a proviso of this nature extends to bankruptcy or insolvency occurring in the lifetime of the testator. If such event has left the after-

Effect of bankruptcy in lifetime of testator.

(*t*) This distinction was also recognized by Lord Lyndhurst, in *Lear v. Leggett*, ante 32, [and by Turner, V. C., in *Rochford v. Hackman*, 9 Hare 484. But a creditor being enabled by 1 and 2 Vict., c. 110, § 36, to obtain an order vesting an insolvent's property in the provisional assignee (which was as much a proceeding *in invitum* as bankruptcy), insolvency under such circumstances was not within the reason of this distinction. See *Pym v. Lockyer*, 12 Sim. 394.

(*u*) 2 Y. & C. C. C. 24.

(*x*) 1 Coll. 441; see also *Martin v. Margham*, 14 Sim. 230; *Rochford v.*

Hackman, 9 Hare 475; *Townsend v. Early*, 34 Beav. 23.

(*y*) In each of the last two cases, the insolvent stated in his schedule that he had no power to assign the property in question. But the V. C. held this to be immaterial.

(*z*) *Lloyd v. Lloyd*, L. R., 2 Eq. 722.

(*a*) In *re Amherst's Trusts*, L. R., 13 Eq. 464 ("part from.") But a mere declaration of insolvency, though voluntary, is no more a forfeiture than any other act of bankruptcy, *Graham v. Lee*, 23 Beav. 388.]

acquired property of the bankrupt or insolvent exposed to the claims of his creditors, then a forfeiture would take place under words sufficiently strong to determine the interest of the devisee or legatee, when the property becomes applicable to any other purpose than the benefit of the *cestui que trust*.

As in *Yarnold v. Moorhouse*, (b) where a testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements; and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends in bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, *or be, or become, applicable to or for any other purpose than for the maintenance of the nephew and his family*, his interest therein should cease, and the stock be held upon trust for his children. Subsequently to the execution of the will, and prior to a codicil confirming it, the nephew took the benefit of the insolvent act (1 Geo. IV., c. 119) in the usual way: afterwards the testator died. As it appeared that the act gave to the Insolvent Debtors' Court a control over stock in the public funds, and the future property generally of a discharged prisoner, (c) the V. C. held that the insolvency operated as a forfeiture of the legatee's life interest in the stock; and his decree was affirmed by Lord Lyndhurst, who thought that, as the dividends were subject, at the discretion of the creditors, to be charged with the payment of their debts, the interest was forfeited under the words carrying *over the bequest in the event of its being or becoming in any manner applicable to or for any other purpose than for the maintenance of the legatee.

[So, in *Manning v. Chambers*, (k) where the income of property was given to one for life or "until he *shall* become bankrupt" or assign his interest, and after his death or upon his becoming bankrupt

(b) 1 R. & My. 364. [So in *Seymore v. Lucas* 1 Dr. & Sm. 177, though the words were "thereafter become bankrupt;" *Trappes v. Meredith*, L. R., 7 Ch. 248, reversing 10 Eq. 604.]

(c) The insolvent had also executed to the provisional assignee a warrant of attorney, as required by the act; but this fact, though very prominently set forth

in the master's report, seems not to have been material, since property of this nature could not, in the then state of the law, be seized under any execution which could have been obtained by virtue of such warrant of attorney.

(k) 1 De G. & S. 282. See an analogous case, *In re Williams*, 12 Beav. 317.

or assigning, over, and the legatee was already a bankrupt at the date of the instrument, the gift over took effect immediately.

The words of futurity, in these cases, are not permitted to operate so as to defeat what upon the will itself appears to be the manifest intention, namely, that the gift shall be a personal benefit to the legatee, and shall not become payable, through him, to any other person. (l)

Conversely if the status or act of the legatee still leaves him in the personal enjoyment of the gift, there is no forfeiture. Therefore if, after having become bankrupt, the legatee, before the first payment of income falls due, procures an annulment of his bankruptcy, forfeiture is avoided. (m) ²⁶ So, where a fund was given to one for life, and afterwards to A, with a clause of forfeiture in case A should in the lifetime of the tenant for life become bankrupt, or do anything which would vest the fund in any other person; A mortgaged his reversion, but having paid off the mortgage before the death of the tenant for life, he was held not to have forfeited his interest. (n)

No forfeiture if, before any payment is due, the bankruptcy is annulled;

—or the encumbrance is paid off.

But in *Cox v. Fonblanque*, (o) it was held that this principle was not applicable where the condition of solvency was precedent. In that case, a testator directed his executors to invest so much of his residuary estate as would produce £100 a year, and to pay the same to A (if not at the testator's death an uncertificated bankrupt or otherwise disentitled to receive and enjoy the same) during his life, or until he should become bankrupt or assign the annuity, or do or suffer something whereby the same would become payable to some other person; and after the determination of that trust, or in the event of its failure, then, after the testator's death, to sink into the residue. A was an uncertificated bankrupt at the testator's death; but within six months *afterwards the bankruptcy was annulled. It was held by Lord Romilly, M. R., that the gift nevertheless failed. "The gift was only made (he said) provided the donee was not a bankrupt; that was a condition precedent annexed to the

Distinction where solvency is a condition precedent, *qu.*;

(l) See per Lord Hatherly, L. R., 7 Ch. 252; per Jessel, M. R., 12 Ch. D. 159.

(m) *White v. Chitty*, L. R., 1 Eq. 372;

Lloyd v. Lloyd, L. R., 2 Eq. 722; *Trappes v. Meredith*, L. R., 9 Eq. 229; In re *Parnham's Trusts*, 46 L. J., Ch. 80; *Ancona v. Waddell*, 10 Ch. D. 157 (though the annulment was not formally completed till long after.) It is otherwise if any payment has fallen due: In re *Parnham's Trusts*, L. R., 13 Eq. 413, 41 L. J., Ch. 292.]

26. So, too, *Robins v. Rose*, 30 L. T. R. (N. S.) 152.

[(n) *Samuel v. Samuel*, 12 Ch. D. 152.

(o) L. R., 6 Eq. 482.

gift; he was a bankrupt, he did not fulfil the condition, consequently there was no gift. The cases cited (*p*) do not appear to me to have any application to this case; those were cases of conditions subsequent, in which the annulment of the bankruptcy prevented the effect of the condition, but here no subsequent annulment could prevent him from having been a bankrupt at the testator's death."

But was not the true question here precisely the same as in the previous cases, viz. was the donee bankrupt within the meaning of the condition? and must not the meaning be the same whether the condition is precedent or subsequent? The case is different where the prohibited act is not in its nature such as to deprive the legatee of the personal enjoyment of the legacy, *e. g.* a composition with creditors. Here personal enjoyment is not made the criterion. If, therefore, the legatee compounds, though without touching the bequeathed interest, the forfeiture takes effect. (*g*)

Where "insolvency" is made a cause of forfeiture, it is not generally necessary that the legatee should have taken the benefit of any act for the relief of insolvent debtors. It is enough that he is unable to pay his debts in full. (*r*)

Lord Eldon is sometimes supposed to have intended in *Brandon v. Robinson* (*s*) to lay it down that a limitation over to some third person is in all cases essential to the validity of a condition making a life interest to cease on bankruptcy. His remarks, however, are not to be taken as going to that extent; (*t*) and *Domett v. Bedford*, (*u*) and *Joel v. Mills*, (*x*) in which the life interest was held to cease upon the proviso for cesser without any gift over, are direct authorities to the contrary.]

(*p*) *White v. Chitty*, *Lloyd v. Lloyd*, *sup.*

(*q*) *Sharp v. Cosserat*, 20 Beav. 470. A colonial bankruptcy is within the term "bankruptcy," *Townsend v. Early*, 34 Beav. 23; In *re Aylwin's Trusts*, L. R., 16 Eq. 590. But in *Montefiore v. Enthoven*, L. R., 5 Eq. 35, it was held by Malins, V. C., upon the context, that executing an inspection deed under the bankrupt act, 1861, not assigning any property, was not within a clause prohibiting "taking the benefit of an act for the relief of insolvent debtors." Cf. *Billson v. Crofts*, L. R., 15 Eq. 314.

(*r*) *De Tastet v. Tavernier*, 1 Kee. 161; In *re Muggeridge's Trusts*, Joh. 625; *Freeman v. Bowen*, 35 Beav. 17. The legatee is estopped by a recital of such inability contained in a composition deed executed by him, *Billson v. Crofts*, L. R., 15 Eq. 314.

(*s*) 18 Ves., see p. 435; and see per Wood, V. C., *Stroud v. Norman*, Kay 330.

(*t*) See per Turner, V. C., *Rochford v. Hackman*, 9 Hare 481, 482.

(*u*) 6 T. R. 684.

(*x*) 3 K. & J. 458.

—where the prohibited act would not denude the legatee.

"Insolvency" means inability to pay in full.

As to validity of condition determining legatee's interest where there is no gift over.

An attempt to vest in a person an interest which shall adhere *to him in spite of his own voluntary acts of alienation, is no less nugatory and unavailing than is, we have seen, the endeavor to create an interest which shall be unaffected by bankruptcy or insolvency, as the law of England does not (like that of Scotland) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who it is well known may be restrained from anticipation. [And where a life annuity was given payable by trustees half-yearly, with a gift over on the death of the annuitant of so much "as should remain unapplied as aforesaid," the gift over was held void on the same principle as a gift over, after an absolute bequest, in case the legatee has not disposed of the legacy.] (y)

Inalienable trust for maintenance not permitted;

except in case of a married woman;

And a restriction on the aliening power of an unmarried woman is no less inoperative than a similar restraint on the *jus disponendi* of a man. This was distinctly admitted in *Barton v. Briscoe*, (z) where a sum of money was vested in trustees, upon trust to pay the annual produce to such persons as A, (a *feme covert*) should, notwithstanding her coverture, appoint, but not so as to deprive herself of the benefit thereof by sale, mortgage, charge or otherwise, in the way of anticipation; and in default of such direction, into her own proper hands, for her separate use, exclusively of B, her husband; and after her decease, upon trust to transfer the fund as A by will should appoint, and in default of such appointment to M., the only child of A. A survived her husband, and now with M filed a bill to obtain a transfer of the fund, which Sir T. Plumer, M. R., decreed, on the ground that the restriction was confined to coverture, and that when a married woman becomes *discoverte*, she has the same power of disposition over her property as other persons.

but not excepting the case of an unmarried woman.

As the restriction was evidently confined to the existing coverture, the case cannot be considered as an authority on the general question, concerning which, however, there is no doubt either upon authority or principle.

Remark on Barton v. Briscoe.

Thus in *Jones v. Salter*, (a) where the income of a money fund was bequeathed in trust for A, the wife of B, for her life, for her separate use, so that the same should not be subject to the debts, dues, or demands, and should be free from the

Inalienable trust for unmarried woman not admissible.

(y) In *re Sanderson*, 3 Jur. (N. S.) 809.]

(z) Jac. 603.

(a) 2 R. & My. 208.

control or interference of B, or of any other husband or husbands, with whom she might at any time thereafter intermarry, *and without any power to charge, encumber, anticipate or assign the growing pay*ments thereof*; and after her decease, in trust for other persons. B, the husband died, and A, the widow, and the ulterior *cestuis que trust*, petitioned for a transfer of the fund. Sir W. Grant, M. R., after some consideration, made the order.

So in *Woodmeston v. Walker*, (b) part of a residue was to be laid out in the purchase of a life annuity for A, for her separate use, and independent of any husband she might happen to marry, with a direction that her receipts, notwithstanding her coverture, should be good and sufficient discharges for the same, and to be for her personal benefit and maintenance, *and without power for her to assign or sell the same by way of anticipation, or otherwise*. A was a widow at the date of the will, and not having married again, applied for payment of the fund. Sir J. Leach, M. R., held that A was not entitled to the absolute interest, inasmuch as the gift was subject to the contingency of a future marriage, when the restriction would be operative. He observed, that at law a wife could have no separate estate, and it was only by the principles of a court of equity that such an estate was permitted for protection against the legal rights of the husband; that to give full effect to such protection, equity permitted a restraint upon the power of disposition, which would be invalid in any other case; and he could not satisfy himself that there was any substantive distinction between a present coverture and a future coverture. It was a familiar case (he added), that where the interest of a legacy was given to an unmarried female for life, to her separate use in case of coverture, and the power of sale or anticipation was restrained, then in case of a future marriage, and a sale or anticipation of the interest during the coverture, the court held that sale or anticipation void, although by the terms of the will the life interest of the legatee was not limited over upon that event. (c) The decree was reversed by Lord Brougham, C., on the authority of *Barton v. Briscoe*. After laying down the doctrine, that equity allows a restriction to be imposed on the dominion over separate estate, as a thing of its own creation, the better to secure it for the benefit of the object, he observed, that the operation of the clause

(b) 2 R. & My. 197.

(c) These passages in the judgment of the M. R. contain a clear statement of the doctrine, as then understood in the pro-

fession; but as, in the case before the court, the *cestui que trust* was *discoverte*, the observations are inapplicable.

against anticipation, where there was no limitation over, rested entirely on its connection with the coverture, and on its being applied to a species of interest which was itself the creature of equity; that the *present was not a case where there was a coverture, but a possibility only of coverture; and it would be going further than the authorities warranted, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest, conveyed to the separate use of a *feme sole* (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply because, at some after period, she might possibly contract a marriage. It was said (he continued), that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, which would fall off upon her husband's death, and be again imposed should she contract a second marriage. That, he observed, would be a strange and anomalous species of estate; nor was it very easy to conceive by what process or contrivance it could be effectually created, unless, perhaps, by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures.

It will be perceived that both the M. R. and the L. C. touched upon a point, which though not raised by the case before the court, is of great and general importance, and was afterwards the subject of much discussion, namely, whether a restriction on alienation, extending generally to future coverture, is valid. Formerly this point was not supposed to admit of doubt. It was considered that a trust restricting anticipation during future coverture might, like a trust for future separate use, be created, without violating the principle which denies effect to inconsistent and repugnant qualifications, as no attempt is made to restrain the aliening power of the object of the trust, until she enters into that state to which the restriction is adapted. It was supposed, therefore, that if no act was done by the *cestui que trust*, while *sole*, to emancipate herself from the restriction, the coverture, when it supervened, had the effect of fastening such restriction on her, in the same manner as if it had existed at the time of its original imposition. To the surprise of the profession, however, a restriction on alienation applied to future coverture, was pronounced by Sir L. Shadwell to be invalid in *Newton v. Reid*, (d) and *Brown v. Pocock*, (e)

Remarks on
Woodmeston v.
Walker.

Controversy
as to trust for
separate in-
alienable use
during future
coverture.

(d) 4 Sim. 160.

(e) 5 Sim. 663.

though without much consideration. Lord Brougham, too, in *Woodmeston v. Walker*, expressed (as we have seen) his strong doubt of the capacity of a testator or settlor to create a fetter on alienation which should attach during *future coverture, and from time to time fall off, when such coverture determines. But it may be asked, is not a trust for separate use during future coverture (the validity of which neither he nor the V. C. attempted to impeach), (f) obnoxious to the same line of reasoning? It comes into operation on each successive coverture, and expires at its determination, and what principle of law forbids the creation of a prospective restriction on alienation in the same manner? Both the trust for separate use, and the fetter on alienation, are certainly not applicable to the actual condition of the *cestui que trust*, while *sole*; but no attempt is made to apply them to such condition; they are only to arise on a change of circumstances, to which they are adapted, and in which, therefore, the supposed incongruity does not exist. Separate property is the creature of equity, and according to Lord Eldon's reasoning in *Brandon v. Robinson* (g), as equity conferred the power of alienation as an incident to the trust for separate use, why should it not modify the power as convenience or the exigency of the case requires?

Happily, the subsequent cases of *Tullett v. Armstrong*, (h) and *Scarborough v. Borman*, (i) have established beyond dispute the validity of a trust for the separate inalienable use of a woman during *future* coverture. In each of those cases Lord Langdale, M. R., and on appeal, Lord Cottenham, held a trust of this nature to be valid.

Validity of trust for separate and inalienable use during future coverture finally established.

"After the most anxious consideration," said the L. C., in concluding an elaborate judgment in the former case, "I have come to the conclusion that the jurisdiction which this court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it throughout a *subsequent* coverture; and resting such jurisdiction upon the broadest foundation,

(f) Even trusts for separate use during future coverture seemed exposed at one time to some peril by the often-recited doctrine in *Massey v. Parker*, 2 My. & K. 274; but the apprehensions on this subject had considerably abated, even before the cases of *Tullett v. Armstrong*, and *Scarborough v. Borman*, *post*, had established beyond controversy the validity

of restrictions on alienation extending to future coverture: *Davies v. Thornycroft*, 6 Sim. 420; *Johnson v. Johnson*, 1 Kee. 648.

(g) *Ante* p. *27.

(h) 1 Beav. 1, 4 My. & Cr. 390, and *Sweet's Cases on Separate Estate* 28.

(i) 1 Beav. 34, 4 My. & Cr. 378.

and that the interests of society require that this should be done. When this court first established the separate estate it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as **a feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation.” (k)

But although a life interest cannot be made to adhere to any person (except a married woman) in spite of his own voluntary acts of alienation, yet as it may be made to cease on bankruptcy or insolvency, so of course it may be determined on voluntary alienation. (l)

Life estate may be made to cease on voluntary alienation.

[But where a sum of money is given to be invested in the purchase, in the names of trustees, of an annuity for the life, and for the benefit, of A, it has been doubted whether a gift over on alienation or bankruptcy is valid; on the ground

May a life annuity, to be purchased with gross sum, be so determined?

[(k) As to whether a trust for separate use is intended to apply to all future covertures, or only to an existing or contemplated coverture, see *Leable v. Dodd*, 1 T. R. 193; *In re Gaffee*, 1 Mac. & G. 541, and the cases there cited; *Hawkes v. Hubback*, L. R., 11 Eq. 5.

(l) *Lewes v. Lewes*, 6 Sim. 304; *Carter v. Carter*, 3 K. & J. 618.] Questions frequently arise as to the effect of particular acts in occasioning forfeiture under clauses of this description. Where an annuity was to cease if the annuitant should do any act with a view to assign, charge, encumber or anticipate, it was held to be forfeited by his giving an unstamped memorandum charging the annuity with an annuity which he had contracted to grant, *Stephens v. James*, 4 Sim. 499.

[But mere negotiation for an assignment is no breach, *Jones v. Wyse*, 2 Kee. 285; and an attempt to alien (where “attempts” are prohibited) must be such an act as but for the prohibition would be an alienation, *Graham v. Lee*, 23 Beav. 391.

A power of attorney given to a creditor to receive dividends is irrevocable, and is therefore a clear violation of a clause against encumbering them, *Wilkinson v. Wilkinson*, 3 Sw. 515; unless arrears then due cover the debt, *Cox v. Bockett*, 35 Beav. 48. So is an authority by agreement with the creditor given to trustees to pay dividends to the creditor, *Oldham v. Oldham*, L. R., 3 Eq. 404; and so held notwithstanding an arrangement between debtor and creditor that the authority should be binding in honor only, this being considered a mere contrivance to evade the condition, *Ib.* In *Craven v. Brady*, L. R., 4 Eq. 209, 4 Ch. 296, marriage was held an act whereby a woman was deprived of “the right to receive or the control over” rents of real estate. But in *Bonfield v. Hassell*, 32 Beav. 217, a personal annuity to a woman with a clause prohibiting any act whereby it might “vest or become liable to vest” in any other person, was held not forfeited by marriage.

that, apart from the gift over, it is an absolute interest in A, and that the gift over is consequently repugnant. Now, in form, and so far as the testator's intention is concerned, the gift of a sum to purchase an annuity for A is not an absolute gift to him of the sum; but the conclusion that A is absolutely entitled to the sum is arrived at in this way. The trust to purchase is first taken to have been actually executed (for it is a perfectly lawful trust), and seeing from that point of view that A may immediately sell the annuity, the court dispenses with the actual purchase, and holds that A is entitled to immediate payment of the sum. But where the annuity when purchased is to be subject to a gift over, the same point of view does not necessarily present the same conclusion. The case would then seem to be the same as if the testator, being possessed of an annuity *pur autre vie*, had bequeathed it in trust for the *cestui que vie*, with a gift over in case of alienation.

The question was raised in *Hatton v. May*,^(m) and it was held by Sir R. Malins, V. C., that the gift over on alienation was good. And Sir R. Kindersley, V. C., appears to have been of the same opinion: for in *Day v. Day*,⁽ⁿ⁾ where, after a life estate in the whole, the trust of one share of residue was to purchase a government annuity for the life of C, and to pay the same to him as it became due and not by anticipation; but if C should either before or after the testator's death become bankrupt or encumber the annuity, then over; C died in the lifetime of the tenant for life without having encumbered or become bankrupt, so that the exact point did not arise; but in dealing with the question whether or not C's representatives were entitled to the share, the V. C. had to consider the effect, as a matter of construction, of the gift over; and he distinguished between the restraint on anticipation, which (he said) apart from the gift over, would have been void in law, and the gift over, which he treated as an effectual provision, without a hint that he thought it open to any objection in point of law.

But if the testator directs the annuity to be purchased in the name

By deed one may settle even his own property on himself for life, with an effectual proviso for cesser on *voluntary* alienation, *Brooke v. Pearson*, 27 Beav. 181; *Knight v. Browne*, 30 L. J., Ch. 649. ^(m) 3 Ch. D. 148. See also *Power v. Hayne*, L. R., 8 Eq. 262, the conflict be-

tween which and *Day v. Day*, *inf.*, is upon another point (*vide ante* p. *397) and not, it is submitted, on the point here dealt with.

⁽ⁿ⁾ 22 L. J., Ch. 878, 17 Jur. 586; also, but too shortly reported, 1 Drew. 569.

of the annuitant, here, the purchase would no sooner be made, than all control of the annuity would be gone, as completely as if the will had contained no gift over: the annuitant therefore is entitled to immediate payment of the value. (o)

III.—It is now proposed to treat of conditions in restraint of marriage. The numerous and refined distinctions on this subject, however, do not apply to devises of, or pecuniary charges upon, real estate, (p) but are confined exclusively to personal legacies [and money arising from the sale of lands; (q) and, *with regard to the latter, they owe their introduction to the ecclesiastical courts, who, in the exercise of the jurisdiction [they once possessed] over personal legacies, it is well known, borrowed many of their rules from the civil law.

Conditions in restraint of marriage.

Distinction in regard to real and personal estate.

By this law, all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void; (p) and marriage simply was a sufficient compliance with a condition requiring marriage with consent, or with a particular individual, or under any other restrictive circumstances; (q) but this doctrine did not apply to widows.

Rule of the civil law.

Our courts, however, [while they equally deny validity to conditions in general restraint of marriage,²⁷ though accompanied by a gift over, (r) yet] have not adopted the rule of the civil law in its unqualified extent, but have sub-

What are valid restraints on marriage by the law of England.

(o) *Hunt-Foulston v. Furber*, 3 Ch. D. 285.]

(p) *Reves v. Herne*, 5 Vin. Ab. 343, pl. 41; *Hervey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Atk. 330.

[(q) *Bellairs v. Bellairs*, L. R., 18 Eq. 510, 516, per Jessel, M. R. The case was one of a mixed fund, and was held governed by the rule respecting personalty.]

(p) *Godolph. Orph. Leg.*, p. 1, c. 15.

(q) *Id.*, p. 3, c. 17.

27. Conditions in restraint of marriage generally are void, 1 *Rop. on Leg.* 758; *Wms. Ex'rs* (6th Am. ed.) 1385; *Theobald on Wills* 311, *et seq.*; 1 *Story Eq.*

Jur., § 289; *Flood on Wills* 442; 2 *Redf. on Wills* 296; so also *Otis v. Prince*, 10 *Gray* 581, where the condition "so long as he shall remain unmarried" was declared void; so to A "provided she remain single," otherwise over, *Randall v. Marble*, 69 *Me.* 310; *Maddox v. Maddox*, 11 *Gratt.* 804, a legacy "during her single life and forever if she remain a member of the Society of Friends," in which case both conditions were declared void; *Williams v. Cowden*, 13 *Mo.* 211, a devise to daughter, and "if she should marry or die," over; *Waters v. Tazewell*, 9 *Md.* 291, a devise for life to A, "provided he should

[(r) *Morley v. Rennoldson*, 2 *Hare* 570; *Lloyd v. Lloyd*, 2 *Sim. (N. S.)* 255; *Bellairs v. Bellairs*, L. R., 18 *Eq.* 510.]

jected it to various modifications. "By the law of England," says an eminent judge, "an injunction to ask consent is lawful, as not restraining marriage generally.^(s) 28 A condition that a widow shall not marry, is *not* unlawful.^(t) 29 An annuity during

remain unmarried after the death of his present wife," and after his death, over; but a provision for several sisters, with remainder to the others, if any should marry, is valid as intended evidently to provide for them while unmarried and otherwise unprovided for, *Jones v. Jones*, 1 L. R., Q. B. Div. 279 (1876.) See also *Scott v. Tyler*, 2 Bro. C. C. 431, and notes in 2 *White & Tudor L. C. Eq.* 429.

(s) *Sutton v. Jewks*, 2 Ch. Rep. 95; *Creagh v. Wilson*, 2 Vern. 573; *Ashton v. Ashton*, Pre. Ch. 226; *Chauncey v. Graydon*, 2 Atk. 616; *Hemmings v. Munckley*, 1 B. C. C. 303; *Dashwood v. Bulkeley*, 10 Ves. 230.

28. Wms. Ex'rs (6th Am. ed.) 1387; 1 Rop. on Leg. 826; 2 Redf. on Wills 290-296. So *Collier v. Slaughter*, 20 Ala. 263, a legacy to A, to be paid "when she come of age or marry with approbation of her guardian," was held to be upon a valid condition. And such conditions have been uniformly upheld in England. See *Collett v. Collett*, 35 Beav. 312; *Dawson v. Oliver-Massey*, 2 L. R., Ch. D. 753; *In re Stephenson*, 18 W. R. 1066.

(t) *Barton v. Barton*, 2 Vern. 308; [*Lloyd v. Lloyd*, 2 Sim. (N. S.) 255; whether the bequest be by the husband or another, *Newton v. Marsden*, 2 J. & H. 356.]

29. From the numerous and conflicting cases upon this point in the United States, the conclusion is perhaps fairly to be drawn that the condition against re-marriage of testator's widow will be upheld and enforced whether there is a gift over or not, *Luigart v. Ripley*, 19 Ohio 24; *Walsh v. Matthews*, 11 Mo. 131; *Dixon v. Ramage*, 2 Watts & S. 142; *Stahl's Appeal*, 2 Penna. St. 301; *McCullough's Appeal*, 12 Penna. St. 197; *Cornell v.*

Lovett, 35 Penna. St. 100; *Holmes v. Field*, 12 Ill. 424; *Drury v. Negro Grace*, 2 Harr. & J. 356; *Vance v. Campbell*, 1 Dana 230; *Duncan v. Phillips*, 3 Head 415; *Hawkins v. Skeggs*, 10 Humph. 31; *Clark v. Tonnison*, 33 Md. 85; *Newton v. Marsden*, 2 Johns. & Hem. 356 (1862), being an English ruling to the same effect. Or during widowhood, *Labane v. Hopkins*, 10 La. Ann. 466. The like condition has been upheld in the following cases, in all of which there was a gift over: *Bates v. Webb*, 8 Mass. 458; *Chappel v. Avery*, 6 Conn. 31; *Phillips v. Medbury*, 7 Conn. 568; *Commonwealth v. Stauffer*, 10 Penna. St. 350; *Fahs v. Fahs*, 6 Watts 213; *Kringle's Estate*, 1 Phila. (Pa.) 443; *Duney v. Schœffler*, 24 Mo. 170; *Dumey v. Sasse*, 24 Mo. 177; *Pringle v. Dunkley*, 22 Miss. 16; *O'Neale v. Ward*, 3 Harr. & McH. 93; *Gough v. Manning*, 26 Md. 347; *Linder v. Newson*, 24 Ga. 139; *Vaughn v. Lovejoy*, 34 Ala. 437; *Hughes v. Boyd*, 2 Sneed 512; *Little v. Bidwell*, 21 Tex. 597; *Selden v. Keen*, 27 Gratt. 576; *Chapin v. Marvin*, 12 Wend. 538. In *Allen v. Jackson*, 1 L. R., Ch. D. 399, (1874, reversing 19 L. R., Eq. 631,) a gift of income to an adopted daughter and her husband for their lives and life of survivor, with gift over if the husband should survive and marry again, was held to be upon a valid condition, *James, L. J.*, saying: "I am of opinion that the gift over on the marriage of a widower is exactly on the same footing as a gift over on the marriage of a widow." But in *Waters v. Tazewell*, 9 Md. 291, a like condition against the husband's re-marriage was held to be void. See also 1 Story Eq. Jur., § 291 b; 2 Redf. on Wills 290-296; *Flood on Wills* 442; *Theobald on Wills* 311-315. In the fol-

widowhood, (u) a condition to marry or not to marry T, is good. (x) ³⁰ A condition prescribing due ceremonies and place of marriage is good; (y) still more is the condition good which only limits the time

flowing cases, on the contrary, the condition against re-marriage of testator's widow has been held to be *in terrorem* and void:

1st. Legacy or annuity without limitation over, *Parsons v. Winslow*, 6 Mass. 169 (exc. limitation over to heir-at-law as residuary legatee); *Stroud v. Bailey*, 3 Grant Cas. (Pa.) 310; *McIlvaine v. Gether*, 3 Whart. 575.

2d. Legacy or annuity with limitation over, *Middleton v. Rice*, Bright. 88; *Hoopes v. Dundas*, 10 Penna. St. 75; *Cook's Estate*, 3 Phila. (Pa.) 60.

3d. Devise without limitation over, *Binnerman v. Weaver*, 8 Md. 517.

In *Bennett v. Robinson*, 10 Watts 348, however, a devise to testator's wife "only so long as she remains my widow," was held to be a conditional limitation, ceasing upon re-marriage without entry or devise over. But a legacy, on the other hand, for widowhood, of things *quæ usu consumuntur* has been held an absolute estate in the wife, *Smith v. Van Nostrand*, 3 Hun 450. So a condition annexed to a life estate to the widow, with remainder to her children, providing that she should not marry without a contract to secure the property to the children, has been held not to affect her interest, *Rayfield v. Gaines*, 17 Gratt. 1. And a devise on condition that the estate should not be sold during widowhood has been construed not to affect a mortgage by the widow, *Williams v. Robinson*, 16 Conn. 524.

(u) *Jordan v. Holkham*, Amb. 209.

(x) *Jervoise v. Duke*, 1 Vern. 19. See also *Randall v. Payne*, 1 B. C. C. 55, ante p. *3; [*Davis v. Angel*, 4 D., F. & J. 524.]

30. *Finlay v. King*, 3 Pet. 346; *Graydon v. Graydon*, 8 C. E. Gr. (N. J.) 230. In the case of *Davis v. Angel*, 4 De G., F. & J. 524, (1862,) and 31 Beav. 223, the gift was to A "in case he should marry B, and in case he should not marry

B" it was to fall into the residue, and the condition was held not to be discharged by A's marrying some other person in testator's lifetime, with his consent. *Campbell, L. C.*, puts the case thus: "What we are dealing with is a bequest contained in a will dependent for its existence upon the happening of a particular event, and the argument is, that the testator by some conduct or act subsequent to the making of the will has in effect struck that condition out of the will, and made the bequest, which is a conditional one, absolute. I do not think that it would be possible in the present state of law to contend that any act of the testator independently of writing—independently of a testamentary act—could have that effect. If a testator by his will, contemplating a future event, gives certain directions respecting, for example, the marriage of A, and afterward the marriage of A takes place in his lifetime, with his approbation, it is easy to conceive, and has been rightly determined, that, the event occurring during the lifetime of the testator, which the will contemplates as future and to occur after his death, if he gives his approbation and assent to that occurrence, it shall be equivalent to what he has directed. But there is nothing that has been cited to me, nor do I believe there is anything that can be found—nor do I think that there is any principle—which would warrant my saying that the assent by the testator to *Isaac Davis* marrying another person than *Esther Godfrey* would have the effect of striking this written direction out of his will, and converting the conditional legacy into a legacy of a different character."

[(y) In *Haughton v. Haughton*, 1 Moll. 611, (a case of real estate,) a condition requiring marriage to be according to the rules of the Quakers was held valid.]

to twenty-one, (z)³¹ or any other reasonable age, (a) provided it be not used as a cover to restrain marriage generally." (b) [Conditions not to marry a Papist, (c) or a Scotchman, (d) not to marry any but a Jew, (e) and that a *man* shall not marry again, (f) have also been held good.

On the other hand, a condition not to marry a man of a particular profession, (g) or a man who is not seized of an estate in fee, or of perpetual freehold of the annual value of £500, (h) is said to be too general, and therefore void.

But a bequest during celibacy is good; "for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage." (i) "This is not a subtlety of our law only: the civil law made the same distinction." (k) And no gift over is required to make the restriction in this form effectual.] (l)

But generally to make a condition to ask consent effectual there must be a bequest over³² in default, otherwise the condition will be regarded as *in terrorum* only. (m) "Different reasons have been assigned for allowing this operation to

(z) *Stackpole v. Beaumont*, 3 Ves. 89.

31. But in *Shackleford v. Hall*, 19 Ill. 212, the condition of a devise, that the devisee should not marry before he reached the age of twenty-one, there being no limitation over, was held valid as to the real property, but *in terrorum* and void as to the personalty.

[(a) *Yonge v. Furze*, 8 D., M. & G. 756 (twenty-eighth).]

(b) Per Lord Thurlow, in *Scott v. Tyler*, 2 B. C. C. 488.

[(c) *Duggan v. Kelly*, 10 Ir. Eq. Rep. 295.

(d) *Perrin v. Lyon*, 9 East 170 (real estate.)

(e) *Hodgson v. Halford*, 11 Ch. D. 959.

(f) *Allen v. Jackson*, 1 Ch. D. 399.

(g) 1 Eq. Cas. Ab. 110, pl. 1, n. in marg.

(h) *Keily v. Monck*, 3 Ridg. P. C. 205.

(i) *Scott v. Tyler*, Dick. 722; *Heath v. Lewis*, 3 D., M. & G. 954; *Potter v. Richards*, 24 L. J., Ch. 488, 1 Jur. (N. S.) 462; *Evans v. Rosser*, 2 H. & M. 190. And see *Bullock v. Bennett*, 7 D., M. & G. 283; *Webb v. Grace*, 2 Phill. 701.

(k) Per Wilmot, C. J., *Wilm. Op.* 373. But the distinction does not hold in gifts of real estate, *Jones v. Jones*, 1 Q. B. D. 274, stated *infra*.

(l) *Heath v. Lewis*, 3 D., M. & G. 954.]

32. In *Flood on Wills* 442, the rule is laid down to this effect, that a gift over is necessary only to conditions *subsequent* in restraint of marriage, and not then where

(m) 2 Ch. Rep. 95; 2 Freem. 41; 2 Eq. Cas. Ab. 212; 1 Ch. Cas. 22; 2 Freem. 171; 2 Vern. 357; 2 Vern. 452; Pre. Ch. 562; 2 Eq. Cas. Ab. 213; Sel. Cas. in Ch. 26; 1 Atk. 361; Willes 83; 2 Atk. 616; 3 Id. 330; 1 Wils. 130; 3 Atk. 364; 19 Ves. 14. Two cases, indeed,

may be cited which may seem to militate against the rule ascribing this effect to a bequest over, *Underwood v. Morris*, 2 Atk. 184, and *Jones v. Suffolk*, 1 B. C. C. 528; but the authority of the former was doubted by Lord Loughborough, in *Hemmings v. Munckley*, 1 B. C. C. 303, 1 Cox

a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the legatee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the court was bound to give effect. Whatever might be the real ground of the doctrine, it was held that where the testator only declared, that in case of marriage without consent, the legatee should forfeit what

an alternative legacy is given, or marriage with consent is one of several events on the happening of which the legatee is to become entitled, or the condition requiring consent is confined to marriage during minority or at reasonable age. In *Gough v. Manning*, 26 Md. 347, Brent, J., thus expresses the rule: "If either real or personal estate be devised on a *condition precedent* to the vesting of the estate coupled with a *devise over* on breach of the condition, the devise or bequest is good and the restraint effectual to defeat the estate. If the estate be *real*, the condition *precedent* in restraint of marriage will be good whether there be a *devise over* or not and whether the restraint be general or qualified. If the estate be *personal*, the condition *precedent* in general restraint of marriage will be void, if there

be *no limitation over*, but if there be a *limitation over*, it will be good. In regard to conditions *subsequent*, if they be in general restraint of marriage and there is *no limitation over*, they are void as to both real and personal estate. If in general restraint of marriage and there is a *limitation over*, they are void as to personal estate. But as to real estate the cases are in conflict. The later and better opinion seems to be that even in that case the limitation over should not prevail. If the condition subsequent be in limited and qualified restraint of marriage, it will be good provided it be accompanied by a limitation over. If there is no limitation over it will be construed as *in terrorem* only and not an imperative condition." See also 1 Story Eq. Jur., § 289.

39; and denied by Lord Thurlow, in *Scott v. Tyler*, 2 B. C. C. 488. **Death of persons whose consent is required.**—And in the other (*Jones v. Suffolk*) it is to be inferred from the judgment, though the fact is not distinctly stated, that one of the persons whose consent was required was dead, and consequently the gift over on marriage without consent failed; [and even if the general rule were not (as, however, it seems that it is)] that where the act or event which is to give effect to the gift over and defeat the prior defeasible gift becomes impossible, the former is defeated, and the latter is rendered abso-

lute, (*ante* p. *11,) yet where the effect of a contrary construction would be, as in the present case, to impose a general restraint on the marriage of the first devisee or legatee, after the death of the person whose consent is required, the case seems to fall within the principle on which conditions restraining marriage generally have been considered as void; the necessary consequence of which would be, that the first legacy is absolute, and the substituted gift fails. The same observations apply to *Peyton v. Bury*, 2 P. W. 626.

was before given, but did *not say what should become of the legacy, in such case the declaration was wholly inoperative." (n)

This observation, it will be seen, refers to conditions subsequent, and certainly it is in regard to them only that it can be made with confidence; for though in many of the cases already cited the condition was precedent, yet there are, on the other hand, not a few such cases in which a compliance with a condition to marry with consent, though unaccompanied by a bequest over, has been enforced.

On examining these cases, however, it seems that in each of them there was some circumstance which afforded a distinction; and though some of these distinctions may appear to savor of excessive refinement, and were not recognized by the judges who decided the cases, yet in no other manner than by their adoption can many of the modern cases be reconciled with the stream of general authorities. But it is impossible that the reader should receive without some degree of jealousy a plan for reconciling these cases, when an eminent judge (o) expressed an opinion that they were so contradictory as to justify the court in coming to any decision it might think proper. With diffi-
Conditions precedent when not in *terrorem*. dence, therefore, the writer submits that, according to the authorities, conditions *precedent* to marry with consent, unaccompanied by a bequest over in default, will be held to be *in terrorem*, unless in the following cases:

First. Where the legatee takes a provision or legacy in the alternative of marrying without the consent, *Creagh v. Wilson*, (p) *Gillet v. Wray*. (q) In *Creagh v. Wilson* this principle is not expressly stated to have governed the decision, but it can be accounted for only on this ground. The smallness of the alternative legacy could make no difference, if the principle be, as apparently it is, that the testator, by providing for the event of the condition being broken, shows that he did not intend it to be *in terrorem* only. In *Gillet v. Wray*, the alternative provision was an annuity of £10; and Lord Cowper held, that as the legatee was provided for, equity could not relieve. (r)

Where the legatee takes an alternative provision.

(n) Per Sir W. Grant, in *Lloyd v. Branton*, 3 Mer. 108.

(o) See Lord Loughborough's judgment in *Stackpole v. Beaumont*, 3 Ves. 98.

(p) 2 Vern. 573, 1 Eq. Cas. Ab. 111, pl. 5.

(q) 1 P. W. 284.

(r) *Hicks v. Pendarvis*, 2 Freem. 41, 2 Eq. Cas. Ab. 212, pl. 1, in which this principle is denied, is of no authority. In *Holmes v. Lysaght*, 2 B. P. C. Toml. 261, the circumstance of another legacy

*Secondly. Where marriage with consent is only one of two events, on either of which the legatee will be entitled to the legacy; as where it is given on marriage with consent, or attaining a particular age, *Hemmings v. Munckley*, (s) *Scott v. Tyler*. (t) In these cases *neither* of the events happened. In *Hemmings v. Munckley*, the legatee married without consent, and died before attaining the required age. In *Scott v. Tyler* the alternative event was reaching a particular age unmarried, and the legatee defeated the gift *quacunqve via* by marrying without consent before that age.

Where legacy is given upon an alternative event.

Thirdly. Where marriage with consent is confined to minority, *Stackpole v. Beaumont*. (u) Lord Loughborough, in his judgment in this case, observed, that it was perfectly impossible to hold that restraints on marriage under twenty-one could be dispensed with, now (*i. e.*, since the marriage act of 26 Geo. II., c. 33) that such marriage was contrary to the political law of the country, unless (if by license) with the consent of parents; and the testator merely places trustees in the room of parents. (x)

Where marriage with consent is restricted to minority.

In all such cases, therefore, the legatee must comply with the condition imposed on him by the will, although there is no bequest over. They certainly show the anxiety of the judges of later times to limit as much as possible the rule adopted from the civil law, which regards such restraining conditions as being *in terrorem* only; and suggest the necessity of great caution in its application to all other cases of conditions precedent, since it is not easy to calculate whether future judges will adopt the distinctions which modern cases present, or treat them as getting rid altogether of

Observations.

being given free from any such condition of marrying with consent was not regarded as an alternative provision so as to bring it within this exception. Against this decision, however, (of the Irish Court of Exchequer,) there was an appeal to D. P., which was compromised. But *Reynish v. Martin*, 3 Atk. 330, seems to go to the same point.

(s) 1 B. C. C. 303, 1 Cox 39.

(t) 2 B. C. C. 431. [And see *Gardiner v. Slater*, 25 Beav. 509, where, however, there was also a gift over.]

(u) 3 Ves. 89. See also *Hemmings v. Munckley*, 1 B. C. C. 303, referred to

supra, where the age on which the legatee was to become entitled, independently of the condition of marrying with consent, was eighteen; and *Scott v. Tyler*, 2 B. C. C. 431, where it was, as to one moiety twenty-one, and the other twenty-five.

(x) The courts seem to have inclined greatly to confine marriage conditions to marriage during minority or within the period fixed for the payment of the legacy, *Knapp v. Noyes*, Amb. 662; *Osborn v. Brown*, 5 Ves. 527; *King v. Withers*, Cas. temp. Talb. 117, 1 Eq. Cas. Ab. 112, pl. 10; [*Duggan v. Kelly*, 10 Ir. Eq. Rep. 473; *West v. West*, 4 Gif. 198.]

the *in terrorem* doctrine, as applicable to conditions precedent. (y) Such, indeed, we may collect was the intention of Lord Loughborough, who in *Stackpole v. Beaumont* made a general and indiscriminate attack on the qualified adoption of the rule of the civil law, as applicable either to personal legacies or legacies charged on real estates, conditions precedent *or subsequent. His decision may, and it is conceived does, rest on solid grounds; but his observations do not evince that respect for authority and established principles which has characterized his successors. [However, in *Yonge v. Furse*, (z) a condition precedent not to marry under twenty-eight was held effectual, though there was no gift over, and no other circumstance to bring it within either of the three categories mentioned above.]

But it should be remembered that no question exists as to the applicability of the *in terrorem* doctrine to conditions subsequent. (a) And here it may be observed, that, admitting it to the fullest extent in regard to conditions precedent; yet, in such a case a legacy given on marriage with consent cannot be claimed by the legatee while *unmarried*, as the doctrine dispenses only with the consent, not with the marriage itself. (b)

It has been decided that where a condition of this nature is annexed to a specific or pecuniary bequest, a residuary clause in the same will is not equivalent to a positive bequest over, in rendering the condition effectual, (c) unless there is an express direction that the forfeited legacy shall fall into the residue. (d) [And it was held in *Keily v. Monck*, (e) that a direction that a forfeited

Marriage necessary, when.
Residuary bequest does not amount to a gift over.

(y) Such a conclusion would overturn *Reynish v. Martin*, 3 Atk. 330, and many other cases decided upon great deliberation.

[(z) 8 D., M. & G. 756.]

(a) See *Marples v. Bainbridge*, 1 Mad. 590 (second marriage of widow); *Wheeler v. Bingham*, 3 Atk. 368 (marriage with consent.) W— v. B—, 11 Beav. 621, where the condition was not to marry any daughter of A, seems also referable to this ground; for “and” could not (as appears to have been argued) be changed into “or” so as to understand a gift over, on breach of one alternative during the life of T., to T.’s widow; while, without the change, there was no gift over corres-

ponding accurately with the condition.]

(b) *Garbut v. Hilton*, 1 Atk. 381.

(c) *Semphill v. Bayly*, Pre. Ch. 562; *Paget v. Haywood*, cit. 1 Atk. 378; *Scott v. Tyler*, as reported Dick. 723; which overrule *Amos v. Horner*, 1 Eq. Cas. Ab. 112, pl. 9.

(d) *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 108, overruling the *dictum* in *Reves v. Herne*, 5 Vin. Ab. 343, pl. 41, and Mr. Roper’s suggestion, 1 Rop. on Leg. 327. See also *Ellis v. Ellis*, 1 Sch. & Lef. 1; [*Stevenson v. Abington*, 11 W. R. 935.]

(e) 3 Ridg. P. C. 205. Legacies charged on real in aid of the personal estate, were there given to the testator’s daugh-

legacy should fall into a fund created for payment of debts and legacies, there being no deficiency in the general personality to occasion a resort to that fund, was not equivalent to a gift over: and a *dictum* to the same effect of Lord Keeper Harcourt (*f*) was cited in support of that opinion. The ground *of this opinion was, that in order to constitute such a gift over, there must appear a clear distinct right vested in a third person; but as there was no necessity to resort to the fund, there was no person who had such a right; there was therefore no gift over. It is conceived, however, that this reasoning could not be applied to a case where a clear undoubted gift over lapses.

Neither does a direction that legacy shall fall into fund for paying debts, if there are no debts.

As the rule which denies effect to a condition restraining marriage, unless accompanied by a bequest over, is (we have seen), confined to bequests of personal estate [and money arising from the sale of land], it follows that where a condition of this nature is annexed to a legacy which is charged on real estate, in aid of the personality, the condition will, so far as the latter (which is the primary fund) is capable of satisfying the legacy, be invalid; while, to the extent that it becomes an actual charge on the real estate, it will be binding and effectual. (*g*)

Effect where legacy is chargeable on real and personal estate.

It is remarkable, that in the early cases of conditions to marry with consent annexed to devises of land, no attempt was made to argue that the condition was not broken or rendered impossible by marriage without consent, as the devisee might survive his wife or her husband, and then be in a situation to comply with the condition. Upon this principle Lord Thurlow, in *Randall v. Payne* (*h*) held that a gift in case J. and M. did not marry into certain families did not arise on their marrying into other families, as they had their whole life to perform

Whether condition requiring marriage with consent is broken by a first marriage without consent.

ters, payable on their respective days of marriage, subject to a proviso, that if either married without consent, or a man not seized of an estate in fee or of perpetual freehold of the annual value of £500, should forfeit her legacy, which was then to sink as in the text; one daughter married with consent, but her husband had not the requisite estate. Lord Clare was of opinion that she was nevertheless entitled to her legacy on

either of two grounds: first, that the legacy was pecuniary and there was no gift over; or secondly, that even if it were held that the legacy was a charge on the realty, the condition was illegal at common law, being too generally in restraint of marriage.

(*f*) Pre Ch. 350.]

(*g*) *Reynish v. Martin*, 3 Atk. 330.

(*h*) 1 B. C. C. 55, *ante* p. *3. See also *Page v. Hayward*, 2 Salk. 570.

the condition; but in a modern case, (*i*) a devise subject to a condition of this nature was held to be forfeited by marriage into another family. There were circumstances distinguishing it from *Randall v. Payne*, particularly a legacy payable at twenty-one or marriage, by way of alternative provision, which showed that the testator had a *first* marriage in contemplation.

[The same argument might arise with regard to a bequest of personal estate if the case were one of those in which a condition precedent may be enforced without a gift over. (*k*) Thus in *Clifford v. Beaumont*, (*l*) where a legacy was given by the testator to his daughter L., payable upon her marriage "with such consent and approbation as aforesaid," (the reference being to a clause requiring marriage "if before twenty-one with the consent of trustees"): the legatee married under twenty-one *and without consent, and Lord Loughborough decided that the legacy was not then payable. (*m*) Afterwards, having attained twenty-one, she married a second husband, and claimed the legacy; but Sir J. Leach, M. R., thought himself precluded from allowing the claim by the previous decision. That decision, however, appears in fact to have left the point untouched; and Sir J. Leach's judgment has consequently been questioned.] (*n*)

But, even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision), that unqualified restrictions on marriage are void, on grounds of public policy. Though, (*o*) where lands were devised to A in fee, with an executory limitation over if she married with any person born in Scotland, or of Scottish parents, the devise over was held to be valid, as not falling within this principle; it is evident from Lord Ellenborough's few remarks, that he would have considered a devise over, defeating the estate of the prior devisee on marriage generally, to be void.

[In *Jones v. Jones*, (*p*) too, it was said by Blackburn, J., that there was strong authority that where the object of the will was to restrain marriage and to promote celibacy, the court would hold such a condition to be contrary to public policy and void. In that case a testator devised land to three women, A, B and C, to possess and enjoy the same jointly during their lifetime, and when any or some of them

(*i*) *Lowe v. Manners*, 5 B. & Ald. 917.

[(*k*) *Vid. ante* p. *46.

(*l*) 4 Russ. 325.

(*m*) *Stackpole v. Beaumont*, 3 Ves. 89.

(*n*) See *Beaumont v. Squire*, 17 Q. B. 905.]

(*o*) *Perrin v. Lyon*, 9 East 170.

[(*p*) 1 Q. B. D. 279.

should die he gave their shares to be possessed and enjoyed by D and her daughter E, during their lifetime, provided that E continued single, otherwise if she should marry her share was to go to the others, share and share like. E married; and it was held that her estate thereupon ceased; for that there appeared to be no intention to promote celibacy, but only that if C married she should be maintained by her husband Blackburn, J., said, the will “comes to this, ‘I have left to three women enough to live upon, and if one of them dies I bring in D and E; but if E (I *suppose* as the youngest she was most likely to change her state) happens to marry, her husband must maintain her and her share shall pass to the rest.’ * * * Looking at the object of this will and the *fact* that the testator *probably* thought that his property was not more than enough for these women to live upon together, *his direction that the one who married should lose her share, cannot be said to be contrary to public policy.”

It was argued that the distinction between a limitation and a condition was established by authority and was fatal to the condition in this case; but it was held that those authorities were inapplicable to devises of real estate, and that as this will showed the testator’s object not to be restraint of marriage it was immaterial that the disposition was in form a condition: what he intended was a limitation during celibacy.

Public policy is equally violated by a condition the natural effect of which is to promote celibacy, whether the testator intended it so to operate or not; but if it is a question of intention, it is certainly more agreeable to general rules to collect that intention from the whole context than to insist on its being manifested by a particular form of words.] (g)

It has been decided, that a requisition to marry with consent, imposed by a testator on his daughters, then spinsters, did not apply to a daughter who afterwards married in the testator’s lifetime, and was a widow at his death. (r) The contrary construction would have produced the absurdity of obliging the legatee to marry again, in order to provide for her children, if any, by her first husband. And in such a case, it seems, if the legatee marry with her father’s consent, or even his subsequent approbation, (s) she will be entitled to all the benefit attached by him to marrying with

Legatee marrying in testator’s lifetime

(g) In *Right v. Compton*, 9 East 267, stated *ante* p. *496, a limitation until marriage was assumed to be valid.] (r) *Crommelin v. Crommelin*, 3 Ves. 227.

(s) *Wheeler v. Warner*, 1 S. & St. 304.

the consent required; ³³ as it is impossible to suppose that a testator could intend to place a daughter, marrying with his own consent, in a worse situation than if she had married with that of his trustees. (*t*) [The substance of the condition is to guard against an improvident marriage, and to this end the control of the testator himself is equivalent to that of his deputies: the condition is substantially performed. But a condition not to marry before a given age, (*u*) or requiring marriage with A, (*v*) or not to marry again, (*x*) is in no sense performed by the testator giving his *consent to a marriage before the prescribed age, or to a marriage with some one else than A, or to a second marriage (as the case may be.) Possibly he intended the legacy to stand freed from the condition: but he could only effect that object (at least since the stat. 1 Vict., c. 26) by some means authorized by that statute.] (*y*)

It seems that the assent of trustees will sometimes be presumed from the non-expression of their dissent, according to the maxim, *qui tacet consentire videtur*, especially if the express assent were withheld with a fraudulent intent; (*z*) [and, in the absence of direct evidence, assent will be presumed, where no objection to the legatee's title is taken for a long period of time

Assent to marriage, when presumed.

33. 1 Rop. on Leg. 819; Wms. Ex'rs (6th Am. ed.) 1388. In re Stephenson, 18 W. R. 1066 (1870), a condition requiring marriage with consent of parents was held to be reasonable, and not satisfied by an enforced consent obtained by the child's misconduct. And a like condition was held valid in Collett v. Collett, 35 Beav. 312 (1866), but the devisee became entitled absolutely on her marriage without the consent of the person required after the death of such person, the marriage taking place before the devisee attained twenty-one, and the gift having been made to take effect "as they attain twenty-one or marry" (with consent.)

(*t*) Clarke v. Berkely, 2 Vern. 720; Parnell v. Lyon, 1 Ves. & B. 479; [Coven-try v. Higgins, 14 Sim. 30; Tweedale v. Tweedale, 7 Ch. D. 633.

(*u*) Yonge v. Furse, 8 D., M. & G. 756.

(*v*) Davis v. Angel, 4 D., F. & J. 524.

(*x*) Bullock v. Bennett, 7 D., M. & G. 283; West v. Kerr, 6 Ir. Jur. 141. The circumstance that the restriction was in the form of a limitation during widowhood appears not to have been essential to these decisions.

(*y*) In Smith v. Cowdery, 2 S. & St. 358, before the act, a condition not to marry A was held dispensed with by testator consenting to marriage with A. This case was relied on by Wood, V. C., in Violet v. Brookman, 26 L. J., Ch. 308, as authority for holding, upon a will dated 1850, that forfeiture for breach of a condition, not to dispute another document, had been waived by the testator's acts. *Sed qu.* The V. C. also held that simple confirmation of the will by codicil subsequently executed set up the gift free from the condition. *Sed qu.*

(*z*) Mesgrett v. Mesgrett, 2 Vern. 580; [Berkley v. Ryder, 2 Ves. 533.

after the alleged forfeiture has taken place.](a) But where the consent is required to be *in writing*, it is not clear that any misconduct on the part of the trustees would be a ground for dispensing with it. Thus in *Mesgrett v. Mesgrett*, (b) though the ^{Consent in writing.} trustee was actuated by the motive of inveigling the legatee into a match without his consent, in order to transfer the portion to one of his own children, yet the Lord Keeper laid some stress on the circumstance that a consent in writing was not required; and Lord Eldon, in *Clarke v. Parker*, (c) observed that it would be difficult to support the decision if it had been. On the other hand, Lord Hardwicke, in *Strange v. Smith*, (d) held that the mother, whose consent *in writing* was required, had, by making the offer to, and permitting the addresses of the intended husband, given consent to her daughter's marriage, which she could not retract, though there appears to have been no written consent; a circumstance to which his lordship does not once advert, nor, which is still more singular, does Lord Eldon, in his comments on this and the other cases, in *Clarke v. Parker*, notice it. Sir J. Leach (e) thought that the accidental omission of a trustee, who approved the marriage, to give a consent *in writing*, would not have invalidated it; but in the case before his Honor, the requisite consent was held to have been contained in a letter *written by the trustee before the marriage, though a more formal writing was in his contemplation. (f)

The courts are disposed to construe liberally the expressions of persons whose consent is required, (g) especially if they have sanctioned, by their acquiescence, the growth of an attachment between the parties. (h) 34 In *Pollock v. Croft*, (i) [where, under the circumstances, consent was not required to be in writing,] a general permission to the legatee to marry according to her discretion, appears to have been deemed sufficient, without any further consent.

A consent to a marriage with A, of course, is no consent to a mar-

(a) *In re Birch*, 17 Beav. 358.]

(b) 2 Vern. 580.

(c) 19 Ves. 12.

(d) Amb. 263.

(e) *Worthington v. Evans*, 1 S. & St.

165.

[(f) See also *Le Jeune v. Budd*, 6 Sim. 441.]

(g) *Daley v. Desbouverie*, 2 Atk. 261;

but as to which, see *Clarke v. Parker*, 19 Ves. 12; *D'Aguilar v. Drinkwater*, 2 Ves. & B. 225.

(h) *D'Aguilar v. Drinkwater*, 2 Ves. & B. 225.

34. See also 1 Rep. on Leg. 815; Wms. Ex'rs (6 Am. ed.) 1388.

(i) 1 Mer. 181; [see also *Mercer v. Hall*, 4 B. C. C. 326.]

As to marriage in wrong name. riage with B, though B should, for the purpose of the marriage, and with the fraudulent design of deceiving the trustees as to his identity, assume the name of A, (*k*) (supposing the marriage, under such circumstances, be lawful.) (*l*)

*It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the court will interfere; (*m*) but in such a case the onus of proof would lie on the complaining party, and it would not be incumbent on the trustee to assign any reason for his dissent, even although the person whose consent is required be the devisee over, (*n*) notwithstanding the doubt

(*k*) Where (as sometimes occurs) a person drops his real name and assumes another, without any authority, a marriage by the adopted name (being the name by which he is generally known) is clearly valid. And even the adoption of a false name, *pro hac vice*, will not, under the statute of 3 Geo. IV., c. 75, invalidate a marriage, unless the misnomer is known to both parties.

Gift to supposed husband or wife not being actually such.—And here it may be observed that a gift by will to a person described as the husband or wife [or widow] of another is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, [or by reason of the second marriage of the supposed widow,] or otherwise: *Giles v. Giles*, 1 Kee. 685; [*Doe d. Gains v. Rouse*, 5 C. B. 422; *Rishton v. Cobb*, 5 My. & C. 145; *In re Petts*, 27 Beav. 576; *Lepine v. Bean*, L. R., 10 Eq. 160.] And, on the same principle, a legacy to a person described as the testator's intended wife has been held to be payable, although the testator did not eventually marry her: *Schloss v. Stiebel*, 6 Sim. 1.* A different rule prevailed, however, where a fraud had been practiced on a testatrix, the discovery of which, there was reason to suppose,

would have destroyed the motive for the gift. As, in *Kennell v. Abbott*, 4 Ves. 804, where the testatrix, under a power, bequeathed a legacy to a man whom she described and with whom she lived as her husband; the marriage was invalid, on account of his having a wife at the time, but the fact was never known to the testatrix. Under these circumstances, the legacy was held to be void. [See also *Wilkinson v. Joughin*, L. R., 2 Eq. 319, where the gift to the fraudulent "wife" failed, but that to the innocent "step-daughter" was upheld. But these cases are properly within the exclusive jurisdiction of the probate court, *ante* p., Vol. I., *27.]

(*l*) *Dillon v. Harris*, 4 Bli. (N. S.) 329. In this case, the marriage was had with a person whom the testator had prohibited the legatee from associating with or having any further knowledge of: expressions which Lord Brougham appeared to think did not necessarily extend to marriage; but Lord Tenterden (whom Lord Brougham consulted) seems to have inclined to a contrary opinion. However, this point did not arise, according to the adjudged construction.

(*m*) See judgments in *Clarke v. Parker*, 19 Ves. 18; [*Dashwood v. Lord Bulkeley*, 10 Ves. 245; *Peyton v. Bury*, 2 P. W. 628.]

(*n*) 19 Ves. 22.

* This was before the act 1 Vict., c. 26, under which the marriage would, if it

had taken place, have been a revocation of the bequest, *ante* p. *128.

thrown out by Lord Hardwicke, in *Harvey v. Aston*, (o) and by Lord Mansfield, in *Long v. Dennis*: (p) but of course the refusal of such a person would be viewed with particular jealousy. And where a trustee refuses either to assent or dissent, the court will itself exercise his authority, and refer it to the master to ascertain the propriety of the proposed marriage. (q)

It seems that consent once given, with a knowledge of the circumstances, and where there is no fraud, cannot be retracted (r)³⁵ without an adequate reason, unless it be given upon a condition, (as that of the intended husband making a settlement,) (s) which is not performed; but actual withdrawal in such a case must be unnecessary, since a conditional consent is no consent until the performance of the condition.

Where the consent of several persons is required all must concur; and the consent of two out of three, the third not expressly dissenting, is insufficient. (t) [But the weight of authority inclines, after some fluctuation, towards dispensing with the concurrence of a renouncing executor or trustee.] Retracting consent.
Consent of all.
Renouncing executor and trustee; his consent not necessary. Lord Hardwicke, in *Graydon v. Hicks*, (u) held that a consent, which was to be obtained of the testator's "executor," was not rendered unnecessary by his renunciation. On the other hand, Sir J. Leach, V. C., (before whom Lord Hardwicke's decision was not cited,) held, (x) [in accordance with an intimation of Lord Eldon's opinion in *Clarke v. Parker*,] that where the marriage was to be with the consent of "trustees," the concurrence of one who had not acted, and had renounced the executorship, (he being also executor,) was not necessary. [And this was followed by Lord Plunket, C. Ir., in *Boyce v. Corbally*, (y) where, though *Graydon v. Hicks* was cited, he held that a legacy with a gift over in case of marriage without the consent of the executors "after named," was not forfeited by marriage without the consent of one of the persons named who had declined to act.]

(o) 1 Atk. 380.

(p) 4 Burr. 2052.

(q) *Goldsmid v. Goldsmid*, Coop. 225, 19 Ves. 368.

(r) *Lord Strange v. Smith*, Amb. 263; *Merry v. Ryves*, 1 Ed. 1; *Le Jeune v. Budd*, 6 Sim. 441.

35. See 1 Rep. on Leg. 810; Wms. 165. Ex'rs (6th Am. ed.) 1388.

(s) *Dashwood v. Lord Bulkeley*, 10

Ves. 230. [It seems that a settlement after marriage is sufficient to satisfy such a conditional consent, *Id.* 244; *Daley v. Desbouverie*, 2 Atk. 261.]

(t) See *Clarke v. Parker*, 19 Ves. 1.

(u) 2 Atk. 167.

(x) *Worthington v. Evans*, 1 S. & St.

(y) 2 Ll. & Go. 102. See also *Ewens v. Addison*, 4 Jur. (N. S.) 1034.]

A consent, required to be given by several persons *nominatim*, of course, cannot be exercised by survivors; and in *Peyton v. Bury*, (z) it was so decided, though the persons were also appointed executors, whose office survives; in which, however, Lord Thurlow seems not to have fully concurred; (a) his opinion being, that the required consent of "guardians," might be given by a survivor, though he admitted that it was collateral to the office. (b) ³⁶ [And with this agrees the decision in *Dawson v. Oliver-Massey*, (c) where it was held that a condition precedent to marry with consent of "parents," was well performed after the death of the father by marrying with the consent of the mother. The court read the will as requiring marriage to be "substantially with proper parental consent—with the consent of the parents or parent, *if any*." On this principle it has been held, that a condition not to marry A without the written consent of the testator applies only to marriage during the testator's lifetime; and that marriage with A after the testator's death, and without any written consent being left by him, was no breach.] (d)

It seems to be clear, that approbation subsequent to a marriage is not in general a sufficient (e) compliance with a condition requiring consent; but Lord Hardwicke, in *Burleton v. Humfrey*, (f) took a distinction between the words "consent" and "approbation," holding the latter to admit subsequent approval, where coupled with the former disjunctively; but he decided the case principally on another ground, and in regard to the admission of subsequent consent the authority of the case has been questioned. (g)

Where a term was limited to trustees, upon trust to raise portions for daughters upon marriage with consent, and upon condition that the husband should settle property of a certain value; and the marriage was had with the requisite consent, but *the

(z) 2 P. W. 626.

(a) See *Jones v. Earl of Suffolk*, 1 B. C. C. 528.

(b) See this point, in regard to powers generally, 1 Powell Dev., Jarm. 239.

³⁶ 1 Rep. on Leg. 802, 804; Wms. Ex'rs (6th Am. ed.) 1388.

[(c) 2 Ch. D. 753. See also per Lord Eldon, *Grant v. Dyer*, 2 Dow, 84. In *Peyton v. Bury*, *sup.*, the condition was subsequent: so that the effect of the deci-

sion was to make the legacy absolute. The power of giving or withholding consent does not generally pass to the representative of a last-surviving executor or trustee, per Lord Eldon, *sup.*

(d) *Booth v. Meyer*, W. N. 1877, p. 224.]

(e) *Fry v. Porter*, 1 Ch. Cas. 138; *Reynish v. Martin*, 3 Atk. 330.

(f) *Amb.* 256.

(g) See *Clarke v. Parker*, 19 Ves. 21.

settlement was omitted by the neglect of the trustee ; the court relieved against a forfeiture, upon a settlement being ultimately made. (*h*) ³⁷

It remains only to be observed, that in a case (*i*) in which the devise was on marrying *with* consent, and the limitation over on marrying *against* consent, the word "against" was construed *without*, to make it alternative to the other gift.

"Against" consent, construed *without*.

IV.—An obligation is frequently imposed on a devisee or legatee to assume the testator's name ; ³⁸ and in such case the question arises, whether the condition is satisfied by the voluntary assumption of the name, or requires that the devisee or legatee should obtain a license or authority from the crown, or the still more solemn sanction of the legislature, unless (as commonly happens) the instrument imposing the condition prescribes one of those modes of procedure.

Condition to assume a name.

In *Lowndes v. Davies*, (*k*) where a testator constituted A his lawful heir, on condition he changed his name to G, it was held that A's unauthorized assumption of the name was sufficient. So, in *Doe d. Luscombe v. Yates*, (*l*) where a condition was imposed upon devisees *not bearing the name of Luscombe*, that they, within three years after being in possession, should procure their names to be altered to Luscombe by act of parliament ; it was held that this requisition did not apply to an individual who, before he came into possession, (*m*) had voluntarily and without any special

Whether satisfied by voluntary assumption.

(*h*) *O'Callaghan v. Cooper*, 5 Ves. 117.

37. "If an executor or trustee whose consent is acquired by the will to the marriage of a legatee refuse to execute the power by consenting, the Court of Chancery will direct an inquiry into the proposed marriage and as to its propriety and further if the marriage should be found suitable, will receive proposals for a settlement on the legatee and issue of the marriage," *Wms. Ex'rs* (6th Am. ed.) 1390 ; 1 *Rop. on Leg.* 808.

(*i*) *Long v. Ricketts*, 2 S. & St. 179. See also *Creagh v. Wilson*, 2 Vern. 573, 1 *Eq. Cas. Ab.* 111, pl. 5.

38. In *Webster v. Cooper*, 14 How. 500, the condition that the devisee should take a certain name "as soon as he

should come into actual possession," was upheld as a valid condition subsequent ; so, too, that he should take the name "at the age of twenty-one," *Taylor v. Mason*, 9 Wheat. 325 ; *Drayton v. Grimke*, Rich. *Eq. Cas.* 321. See also 2 *Redf. on Wills* 298 ; 1 *Rop. on Leg.* 886.

(*k*) 2 *Scott* 71, 1 *Bing. N. C.* 597.

(*l*) 1 *D. & Ry.* 187, 5 *B. & Ald.* 543. See also *Hawkins v. Luscombe*, 2 *Sw.* 375.

(*m*) He was under age at the time, and this perhaps is not an immaterial circumstance, as *Abbott, C. J.*, observed that "a name assumed by the voluntary act of a young man *at his outset into life*, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind,

authority assumed the name of Luscombe; he being, it was considered, a person "bearing the name" within the meaning of the will. (*n*)

[But] in *Barlow v. Bateman*, (*o*) a testator gave a legacy of *£1000 to his daughter, upon condition that she married a man of the surname of *Barlow*, to be paid her on the day of such her marriage with a *Barlow* aforesaid; but if she died unmarried, or married a person not bearing the surname of *Barlow*, he gave the legacy to another. The daughter married a person whose name was *Bateman*, but who, at the time of the marriage, assumed the name of *Barlow*, and this was held to be a compliance with the condition by Sir J. Jekyll, M. R., who said, that the usage of passing acts of parliament for the taking upon one a surname was but modern, and that any one might take upon him what surname, and as many surnames as he pleased, without an act of parliament. It was suggested that the husband might, after receiving the legacy, resume his old name, and the court was requested to make an order that he should retain it, but this was refused. [The decision of the M. R. was, however, reversed in D. P., probably on the ground urged in argument that the testator intended a person of his own family, and originally bearing the name of *Barlow*. (*p*)

Another condition frequently imposed on a devisee is that he shall "reside" in a particular house.³⁹ The terms of the will are generally such as to leave no doubt that personal resi-

Condition requiring "residence."
as much and effectually his name as if he had obtained an act of parliament to confer it upon him." [But see 3 *Dav. Conv.* 362, *n.*, 3d ed.]

(*n*) As to gifts to persons of a prescribed name, *vide* *Jobson's Case*, *Cro. EL.* 576, and other cases cited, *ch. XXIX., ad fin.* And as to the period at which the conditions for the assumption of a name are to be performed, see *Guliver v. Ashby*, 1 *W. Bl.* 607, 4 *Bur.* 1940, *ante* p. *8; *Lowndes v. Davies*, 2 *Scott* 74; *Pyot v. Pyot*, 1 *Ves.* 335, *post*; *Cro. EL.* 532, 576; [*Langdale v. Briggs*, 8 *D., M. & G.* 391 (construction of "in possession or receipt of the rents" where the devised estate was reversionary.)

Whether the assumed name is to stand last, or alone, as surname, see *D'Eyncourt v. Gregory*, 1 *Ch. D.* 441; *Bennett v. Bennett*, 2 *Dr. & Sm.* 276.]

(*o*) 3 *P. W.* 65.

[(*p*) 2 *B. P. C. Toml.* 272.]

39. A condition that devisee "shall reside on" the property devised, or "in the town of H.," has been held to be a condition subsequent, repugnant to the grant and void, *Pardue v. Givens*, 1 *Jones Eq.* 306; *Newkerk v. Newkerk*, 2 *Caines* 345; see, *contra*, *Lowe v. Taiver*, 45 *Ga.* 481. A gift, however, to certain persons, "or such of them as shall be living in England at the time of my death," will not reach those not so residing, *Ross v. Iles*, 20 *W. R.* 858. And a condition requiring residence on the estate devised has been held not to apply to the time of devisee's minority in *Parry v. Roberts*, 19 *W. R.* 1000, 25 *L. T. R.* (N. S., 1871,) 371. But a condition precedent to a remainder after the death of remainderman's mother, "provided he shall live on

dence to some extent is required; (q) but where no period is fixed for the duration of the residence, it is almost impossible to enforce the condition; for on the one hand it may be contended that the devisee must live in the house always; and, on the other, that if he constantly keeps up an establishment there it will be sufficient if he goes there only once in his life. (r) In *Fillingham v. Bromley* (s) this difficulty was held insurmountable, and a purchaser was compelled by Lord Eldon to take a title depending on the invalidity of the condition. "Suppose (said the L. C.) the devisee had been a member of parliament, and had had a house in London, would you say he did not live and reside at J.?" Even should the devisee be required to reside in the house during a defined period, (t) or to make it his principal or usual place of abode, (u) the condition may still be frustrated, *for personal presence in the specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there. (x) It will depend on the particular terms of the will whether a forced absence or departure from the house, as where the devisee becomes bankrupt and the assignees sell to a purchaser who turns the devisee out, (y) is a breach of the condition. In a case where a life estate was given to a married woman on condition that she should within eighteen months cease to reside at S., a place where her husband carried on a business which required his residence there, the condition was held void, as obliging her to neglect the performance of a duty, sc. living with her husband. (z) And of course a life annuity given to A, to cease when A and B should cease to reside together, was held not to be determined by the death of B.] (a)

Sometimes a testator imposes on a devisee or legatee a condition

the place till that time and carry it on," has been held to be good, *Marston v. Marston*, 47 Me. 495.

[(q) See cases *ante* p. *798. As to the construction of a bequest to a class of persons "residing in this country," see *Dale v. Atkinson*, 3 Jur. (N. S.) 41; *Woods v. Townley*, 11 Hare 314.

(r) Per Wood, V. C., Kay 545. See, however, *Stone v. Parker*, 29 L. J., Ch. 874, where the difficulty was not alluded to.

(s) T. & R. 530. See also 7 Beav. 443; 24 L. J., Ch. 488.

(t) *Walcot v. Botfield*, Kay 534.

(u) *Wynne v. Fletcher*, 24 Beav. 430; *Dunne v. Dunne*, 3 Sm. & Gif. 22, 7 D., M. & G. 207.

(x) Per Wood, V. C., *Walcot v. Botfield*, Kay 550; per Jessel, M. R., *Astley v. Earl of Essex*, L. R., 18 Eq. 295.

(y) *Doe v. Hawke*, 2 East 481; *Doe d. Shaw v. Steward*, 1 Ad. & Ell. 300.

(z) *Wilkinson v. Wilkinson*, L. R., 12 Eq. 604, citing *Mitchel v. Reynolds*, 1 P. W. 181.

(a) *Sutcliffe v. Richardson*, L. R., 13 Eq. 606.]

Condition that a legatee shall not dispute the will, as to personal estate, ineffectual without a gift over. that he shall not dispute the will. Such a condition is regarded as *in terrorem* only, at least, where the subject of disposition is personal estate; and, therefore, a legatee will not, by having contested the validity or effect of the will, forfeit his legacy, where there was *probabilis causa litigandi*, (b) unless, it seems, the legacy be given over upon breach of the condition. (c)

[But this doctrine has never been applied to devises of real estate :

Secus, as to real estate;

on the contrary, in *Cooke v. Turner*, (d) it was expressly decided that such a condition annexed to a devise of land was valid and effectual without a gift over on breach. It was argued that the condition was void as being contrary to the liberty of the law; (e) but it was answered by the court, that it was no more so than a condition not to dispute a person's legitimacy, which was good: (f) that, in truth, there was not any policy of the law on the one side or the other: that conditions said to be void *as trenching on the liberty of the law were such as restrained acts which it was the interest of the state should be performed, as marriage, trade, agriculture, and the like; but it was immaterial to the state whether land was enjoyed by the heir or the devisee, and, therefore, the condition was good, and the devisee had, by disputing the will, forfeited the devise in her favor.

The argument and judgment both turned on the legality of the condition, and no doubt seems to have been entertained that if it was legal it must also be effectual. That this ought to be the sole criterion in all cases where the effect of a condition is brought in question, can scarcely be doubted; and that as no gift over will give effect to a condition in itself illegal (as a condition in total restraint of marriage,) (g) so a legal condition should never be rendered ineffectual by the absence of such a gift. The validity of a condition that the devisee shall not dispute another testator's will was assumed in *Violett v. Brookman*, (h)

(b) *Powell v. Morgan*, 2 Vern. 90; *Lloyd v. Spillett*, 3 P. W. 344; *Morris v. Burroughs*, 1 Atk. 404.

(c) *Cleaver v. Spurling*, 2 P. W. 528; 1 Rep. 304; [*Stevenson v. Abington*, 11 W. R. 935. A gift to the executors of the first legatee will not suffice, *Cage v. Russell*, 2 Vent. 352.

(d) 15 M. & Wel. 727, 14 Sim. 493.

(e) Citing *Shep. Touchst.* 132; which, however, says only that conditions which are against the liberty of the law are in-

valid, not that a condition not to dispute a will is against the liberty of the law. And see *Anon.*, 2 Mod. 7.

(f) *Stapilton v. Stapilton*, 1 Atk. 2.

(g) *Morley v. Rennoldson*, 2 Hare 570; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255.

(h) 26 L. J., Ch. 308. *Evanturel v. Evanturel*, L. R., 6 P. C. 1, (Canadian appeal,) may be usefully perused with reference to such conditions, and with reference to the question whether legal proceedings are a breach if abandoned

although there was no gift over on breach: 40 the only question was, whether the testator had by concurring in the acts alleged as a breach waived the condition; and it was held, that he had; (i) and further, that he had not re-imposed it by subsequent codicils, which simply confirmed the will.

And, even with regard to personal estate, the *in terrorem* doctrine is not admitted in cases arising on other conditions than those relating to marriage and disputing a will. Thus, in *In re Dickson's Trust*, (k) where a testator bequeathed to his daughter a life interest in £10,000, and by a codicil,

—and as to other cases of personal estate.

In re Dickson's Trust.

before judgment. A devise on condition not to take any proceedings at law or in equity relating to the testator's estate is too wide: it would prevent the devisee from asserting or defending his right to the devised estate against a wrongdoer, and is absurd and regugnant, *Rhodes v. Muswell Hill Land Company*, 29 Beav. 560. A condition not to make any claim against a testator's estate was held not to prohibit the legatee from continuing a litigation pending between them at the testator's death, *Warbrick v. Varley*, 30 Beav. 347. A breach must of course be proved by the person alleging it, *Wilkinson v. Dyson*, 10 W. R. 681 (condition not to interfere in administration.)]

40. In *Chew's Appeal*, 45 Penna. St. 228, a condition to a devise that "in case any of my said devisees shall dispute, contest or litigate any devise—or seek by any proceeding at law or otherwise to invalidate my said will," then devise over, was held not to take effect where there was *probabilis causa litigandi*; see, too, *Mallet v. Smith*, 6 Rich. Eq. 12, such condition being there declared void. On the other hand, a condition in a legacy not to claim, demand, &c., under certain deeds was held to work a forfeiture on disallowance of such claim made, *Rogers v. Law*, 1 Black 253. And in *Brownson v. Gifford*, 8 How. Pr. 389, a gift over to executor on breach of like condition made estate to divest on forfeiture. And it has been held in *Hapgood v. Houghton*, 22

Pick. 480, that the testator's words, "loth to offend by the word pay the generous feelings of my friends A and B, I wish their acceptance of—," constituted a condition which was broken and forfeited by an action brought by the legatees. And a devise, excluding any one "who goes to law to break my will," was held to be upon valid condition in *Bradford v. Bradford*, 19 Ohio 546. So in a devise with gift over if the devisee sue estate, the devisee, by his acceptance, was held estopped from bringing suit, *Shivers v. Goar*, 40 Ga. 676. It is an established rule that no one can accept the benefit of a will and make a claim against it, *Hyde v. Baldwin*, 17 Pick. 303; *Fredericks v. Gray*, 10 Serg. & R. 182. "A condition that the legatee shall not dispute the will is valid in law though it has been generally considered as *in terrorem* merely and will not operate a forfeiture by reason of the legatee's having disputed the validity or effect of the will. But where the legacy is given over to another person in case of a breach of such condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee"—or even if gift over is by residuary legacy—but not if it is to the executor of the will, *Wms. Ex'rs* (6th Am. ed.) 1334. So, too, *Flood on Wills* 440; 1 *Rop. on Leg.* 795; 2 *Redf. on Wills* 298.

[(i) But as to this see above, *52.

(k) 1 *Sim. (N.S.)* 37. And see per *Wood, V. C.*, in *re Catt's Trusts*, 2 H. & M. 52.

provided that if she should become a nun she should forfeit the legacy: there was no gift over; but Lord Cranworth, V. C., held that the condition being legal was effectual, and that the daughter having become a nun had forfeited the legacy. So, in the earlier case of *Colston v. Morris*, (l) where a testator gave a legacy, and declared that *if the legatee should ever interfere with the management of trustees appointed for the education of the legatee's daughter then he revoked the legacy; there was no gift over, and it was argued that the declaration or condition was therefore *in terrorem* only; but it was held by Sir. J. Leach, V. C., that the legatee was not entitled to the legacy unless he undertook to comply with the condition.

Where the legatee has taken his legacy with a legal condition of any kind annexed, he is, of course, estopped by his own act from afterwards insisting on rights, which by the terms of the condition he is bound to release, (m) or from declining a duty which he is thereby required to perform. This principle was applied in *Att.-Gen. v. Christ's Hospital*, (n) where a testator bequeathed to the governors of the hospital (who had power to accept such gifts) an annuity of £400, forever, upon condition that his trustees should be at liberty to send a certain number of children to be educated at the school; and in case and as often as the governors should refuse to admit the children, the trustees were empowered to apply the annuity towards the education of the children elsewhere. For some years the governors of the hospital received the annuity and admitted the children, but afterwards resolved to do so no longer. Sir J. Leach, M. R., said the question was whether this was a gift of the annual sum so long as they should receive the children, or a gift upon condition that they should receive them? He thought it clear the latter was the true construction, and that having accepted it they were bound by the condition. The proviso gave an authority to the trustees, without releasing the governors from their engagement.]

(l) Jac. 257 n.

(m) *Egg v. Devey*, 10 Beav. 444.

(n) Taml. 393. And see *Gregg v.*

Coates, 23 Beav. 33.

* CHAPTER XXVIII.

GIFTS TO THE HEIR AS PURCHASER (WITHOUT ANY ESTATE IN THE ANCESTOR.)

Gifts to the heir,¹ whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term *heir* is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy.² It is clear, therefore, that where a

Gifts to "heir,"
how con-
strued.

1. The cases in which "heirs," "heirs of the body," and like words are construed to be words of *purchase*, there being a previous estate given to the ancestor, are considered in ch. XXXVII., under the rule in Shelley's Case. "The expression 'words of limitation' is always used in contradistinction to the expression 'words of purchase.' By the former expression it must be understood that the *interest* limited by these words is not originally given to the *heirs* but to their *ancestor*, either mediately, immediately or eventually: so as to create in him an estate or interest of inheritance descendible to his heirs of the given description. * * * By the latter expression is meant such words as give the estate limited by the term 'to the heirs,' originally in their *own right* and as the persons answering that description, and not through the medium of, or by descent from any ancestor; so

that these heirs are the purchasers under the appellation of heirs and are to take without any reference to a previous right in their ancestor, in whom the estate to pass by the limitation to the heirs cannot vest in any possible event. A consequence is that the power of alienation commences in the heirs and not in the ancestor; and the heirs, unless their interest shall be defeated under the rules applicable to contingent remainders, will not be liable to the charges or bound by the conveyance of the persons, who in point of fact and in reference to other property may be their ancestors," 1 Prest. on Est. 36; see also Smith on Exec. Int., (2 Fearne 210,) §§ 403, 404.

2. Lombard v. Boyden, 5 Allen 249; Porter's Appeal, 45 Penna. St. 201; Eby's Appeal, 50 Penna. St. 311; Campbell v. Rawdon, 18 N. Y. 412 (reversing 19 Barb. 494); Seabrook v. Seabrook, Mc-

testator devises real estate simply to his heir, or to his heir-at law, or his right heirs, the devise will apply to the person or persons answering this description at his death, and who, under the statute regulating the law of inheritance, (a) will take the property in the character of devisee, and not, as formerly, by descent.³ And if the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, the circumstance that the expression is *heir* (in the singular) creates no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description; (b) and which persons, if there are no words to sever the tenancy, will be entitled as joint tenants. (c)

Mullen Eq. 206; Rochelle v. Tompkins, 1 Strobh. Eq. 114; Aspden's Estate, 2 Wall., Jr., C. C. 368; Rogers v. Birchhouse, 5 Jones Eq. 304; Clarke v. Cordis, 4 Allen 466; (and not distributees) Wood v. Keyes, 8 Paige 365; Smith v. Harrington, 4 Allen 566; Rawson v. Rawson, 52 Ill. 62; Lord v. Bourne, 63 Me. 368; or "statutory heirs," Clark v. Scott, 67 Penna. St. 446; including widow by statute, Peacock v. Albin, 39 Ind. 25; Evans v. Harillee, 9 Rich. L. 501; but see, *contra*, Richardson v. Martin, 55 N. H. 45. So the words "right heir-at-law" designate as a *nomen collectivum* the statutory heirs, Williman v. Holmes, 4 Rich. Eq. 475; and may include a child adopted under statute, Johnson's Appeal, 87 Penna. St. 346. "An heir is he upon whom the law casts the estate immediately on the death of the ancestor," 2 Bl. Com. 201; 2 Redf. on Wills 67; O'Hara on Con. of Wills 297. A devise in remainder to the "*heirs and assigns*" of A, is equivalent to "heirs" alone, and they will take to the exclusion of A's assigns or grantees, Brookman v. Smith, 6 L. R., Exch. 291 (1871.) As to the meaning of the word "heir," used as legatee of personal property, see note 13. "Parol evidence is not admissible to vary the meaning of the word heir," O'Hara on Con. of Wills 297; as that the testator, an Englishman domiciled in Penn-

sylvania, meant heir according to English law, Aspden's Estate, 2 Wall., Jr., C. C. 368. But the claimant under the description of "heir" must show that "he is the heir in the sense in which testator used the term," 1 Powell on Dev. 309.

(a) 3 and 4 Will. IV., c. 106, § 3.

3. "When the limitation is to the 'right heirs,' *eo nomine*, of a testator, the gift is void and the fee will descend," 2 Prest. on Est. 17. "If it gives precisely the same estate that the heir would take by descent," 4 Kent 494, § 67; Wms. Ex'rs (6th Am. ed.) 1955, note (r), and 126, note (m); O'Hara on Con. of Wills 298; 1 Powell on Dev. 414, 427. And a devise in remainder to testator's "own right heirs" is void, the estate passing *by descent* to his heirs-at-law, (including his widow, by statute,) Seabrook v. Seabrook, 10 Rich. Eq. 495; Sedgwick v. Minot, 6 Allen 171; Harris v. McLaran, 1 George 533; Parsons v. Winslow, 6 Mass. 178; Ellis v. Page, 7 Cush. 161; Barnitz v. Casey, 7 Cranch 456; Williman v. Holmes, 4 Rich. Eq. 475. But a devise in remainder to testator's "own right heirs of the name of H. T.," is valid, Thorpe v. Thorpe, 8 Jur. (N. S.) 871, 10 W. R. 778, 32 L. J., Exch. 79 (1862.)

(b) Mounsey v. Blamire, 4 Russ. 384.

[(c) Lit., § 254.

And it is to be observed, that a devise [to *heirs*, in the plural,] (though contained in a will made before the year 1838) vests in *the heir an estate in fee simple, *without further words of limitation*, or any equivalent expression, (d) on the ground (to use the quaint though significant language of an early judge,) (e) that "the word heirs is *nomen collectivum* : and it is all one to say heirs of J. S., as to say heir of J. S., and heirs of that heir ; for every particular heir is in the loins of the ancestor, and parcel of him."

Devise to
heirs passes
fee simple.

Upon the same principle it is well settled, that a devise to *the heirs of the body* of the testator or of another confers an estate tail ; which estate, it is to be observed, will (unless stopped in its course by the disentailing act of the tenant in tail,) devolve to all persons who successively answer the description of heir of the body. ⁴ The leading authority for this doctrine is *Mandeville's Case*, (f) the circumstances of which aptly illustrate the peculiar mode of devolution in such cases. John de Mandeville died, leaving issue by his wife, Roberge, two children, Robert and Maude. A gave certain lands to Roberge, and to the heirs of John de Mandeville, her late husband, on her body begotten ; and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heir of the body of his father, being a good name of purchase,) and that then, when he died without issue, Maude, the daughter, was tenant in tail of the body of her father, *per formam doni*. "In which case it is to be observed," says Lord Coke, "that albeit Robert being heir, took an estate tail by purchase, and the daughter was no heir of his (John's) body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which, notwithstanding her brother was, and he was capable at the

Heirs of the
body as
purchasers.

Mandeville's
Case.

(d) Co. Lit. 10 a.]

(e) Per Pollexfen, [*arguendo*] in *Burchett v. Durdant*, Skin. 206 ; [*Marshall v. Peascod*, 2 J. & H. 73 (deed.)]

4. And a devise to the "right heirs of A by B forever," creates an estate tail, *Wright v. Vernon*, 2 Drew. 439. But in *Larabee v. Larabee*, 1 Root 555, a devise to A "and to the male heir of his body lawfully begotten in fee tail," was held to pass a fee tail to all A's sons. See also 2 Prest. on Est. 391 ; 2 Redf. on Wills 57.

(f) Co. Lit. 26 b. See also *Southcote*

v. Stowell, 1 Mod. 226, 237, 2 Mod. 207-211, Freem. 216, 225 ; *Wills v. Palmer*, 5 Burr. 2615, 2 W. Bl. 687 ; [*Wright v. Vernon*, 2 Drew. 439, 7 H. L. Cas. 35, 4 Jur. (N. S.) 1113. The entail must be traced as if limited originally to the testator or other person so as to be descendible from him to the claimant. It may of course be general or special, but must not be eccentric or invented to suit the occasion, *Allgood v. Blake*, L. R., 7 Ex. 363 ; per *Bosanquet, J.*, 9 Cl. & Fin. 625.]

time of the gift; and, therefore, when the gift was made, she took nothing but in expectancy, when she became heir *per formam doni*."

[Whether a devise (by will dated before 1838) to heir in the singular is as effectual to confer an estate in fee simple as a devise to heirs in the plural, seems never to have been decided.⁵ *The affirmative is supported by a *dictum* of Holt, C. J.; (g) and by some observations of Sir W. P. Wood, V. C., who said (h) that, though Coke's reasoning pointed to the plural as necessary, (i) "later authorities appeared to have settled that the same consequence followed where heir was used in the singular." The passage in Coke here referred to deals with a limitation to A and his heirs, and the later authorities alluded to (but not specified by) the V. C., were probably those which are cited in Hargrave's note to that passage, and most of which deal with gifts to A and his heir, not to gifts to the heir by purchase. The question is of rapidly diminishing importance.

If, however] a devise to the heir general in the singular, confers an estate in fee simple, so, on the same principle, a devise to the heir of the body in the singular [ought to] be held to confer an estate tail by purchase on the person or persons first answering the description of heir of the body.⁶ [But in *Chambers v. Taylor*, (j) Lord Cottenham, though he treated the decisions upon gifts to A and the heir of his body as authorities applicable to the question

5. It is an established rule of the common law that as a word of limitation "heir" in the singular number, used in a deed will only convey a life estate or an estate tail, 2 Prest. on Est. 8, 476. So 2 Redf. on Wills 57.

(g) *Beviston v. Hussey*, Skin. 385, 563.

[(h) *Marshall v. Peascod*, 2 J. & H. 75. Distinguish between such a devise and a will thus, "I make A heir of my land:" which gives A the fee simple, "for such estate as the ancestor hath such is A to inherit," *Spark v. Purnell*, Hob. 75; *Jenkins v. Lord Clinton*, 26 Beav. 108, 8 H. L. Cas. 571 (*Jenkins v. Hughes*); *ante* p. *357, n. (d).]

(i) Co. Lit. 8 b.

6. But it seems that, in *White v. Collins*, Com. Rep. 289, cited in 2 Prest. on Est. 554, a remainder "to the heir male

of A's body lawfully begotten, *during the term of his natural life*," was construed to be a life estate only by reason of the superadded words confining it to that term.

(j) 2 My. & C. 376. In that case land was settled by deed to the use of the settlor and his wife successively for life, remainder to the use of the heir female of the body of the settlor on the body of his said wife already begotten and then living, or which might be begotten thereafter, and in default of such issue to the use of the heir male of the body of the settlor on the body of his said wife to be begotten, and in default of such issue to the right heirs of the settlor. At the date of the deed the settlor and his wife had four daughters living, but no issue male: at his death the four daughters and several sons of the marriage survived.

what estate was conferred by a devise to the heir of the body of A. by purchase (and so far anticipated Sir W. Wood's method of ascertaining the effect of a devise to the heir general by purchase), drew from those decisions the conclusion that a devise to heir of the body in the singular by purchase would not confer an estate tail. After noticing the decisions upon devises to A and the heir of his body in the singular, the L. C. said: "These cases prove that the word heir in the singular number has sometimes the same effect as the word heirs in the plural; but if words of limitation are superadded to the word heir, it is considered as conclusively showing that the word is used as a word of purchase. When that is not the case, it is considered in construing wills as *nomen collectivum* for the purpose of creating an estate tail in the first taker, and not as creating an estate tail *in the person answering the description of heir. If the word heir would *per se* give an estate of inheritance to the party answering the description, there would be no reason for any distinction whether words of limitation or inheritance were or were not superadded. These cases therefore prove that the daughters would not have taken estates of inheritance as purchasers under a will; and it is not pretended that their parents took more than estates for life."

But assuming that a devise to the heir of the body in the singular would confer an estate tail by purchase on the person or persons first answering the description of heir of the body it would still remain undecided] whether the property would devolve successively to every individual who should answer the description of heir of the body, in like manner as under a devise to heirs of the body in the plural, or whether the estate would vest in and be confined to the individual who should first answer the description of heir of the body, and who would take an estate tail by purchase. The latter was evidently the opinion of Taunton, J., in *Doe d. Winter v. Perratt*, (*k*) who, after citing *Mandeville's Case*, (*l*) and *Southcote v. Stowell*, (*m*) said: "In these instances the estate tail arises out of proper words of limitation in the plural number denoting a certain continuous line of posterity 'heirs of the body.' But no such effect can be given to the word 'heir,' 'heir of the body,' 'right heir,' or 'next' or 'first heir,' where they constitute only a mere *designatio personæ*." (*n*) The case, how-

(*k*) 9 Cl. & Fin. 616.

(*l*) *Ante* p. *62.

(*m*) 1 Mod. 226, 237; 2 Mod. 207, 211.

[(*n*) May not this mean that where

(i. e., assuming that) the expressions in question, in the singular, constitute *only designatio personæ*, they not only do not confer such an estate as was exemplified

ever, did not raise this precise point, as the words "[first] male heir" occurring in the will then before the court were held to mean first male *descendant*, in which sense they could not operate to confer an estate tail by force of the doctrine under consideration any more than those words themselves would if employed by the testator. It seems diffi-

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cult, however, to reconcile with this doctrine the case of *Whitelock v. Heddon*, (o) where A devised to his grandson C all his estates, *to him, his heirs, and assigns, except as therein-after mentioned; that is to say, provided that in case his (testator's) son B should have any son or sons begotten or born in lawful matrimony, then he devised the said estates *to such (p) male issue as his son B should or might have at the time of C's attaining the age of twenty-one years*; but in case his said son B should have any male issue, then he

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issue.

directed that C should receive the rents, until twenty-one, as above mentioned: it was held, that a son of B, *in ventre matris* on C's attaining his majority, (and who was the eldest son *in esse* at that period, the first being dead,) *took an estate tail* by force of the word "issue," and not a fee-simple by the effect of the word "estates." Eyre, C. J., said, as the objects were the sons of the testator's son, who, it appeared, were to have his bounty in preference to the son of his daughter (for such C was), and *as "issue" was a collective term*, capable of being descriptive of either person or interest, or both, he thought it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate tail male to the sons of B, as many as there should be, in order of succession.

It is evident that the court did not construe the words "male issue"

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as altogether synonymous with heirs male of the body, (q) inasmuch as the devise was held to take effect in favor of

in *Mandeville's Case*, but no estate of inheritance whatever? The tenor of the learned judge's remarks seems to be rather to the effect that the words in question regularly confer a life estate only; but it was not necessary for him to go further than to say that such was their effect when (as in the case he was considering) they amounted only to *designatio personarum*. In *Doe d. Sams v. Garlick*, 14 M. & W. 698, a devise to "the person or persons as at my death shall be the heir or heirs-at-law of A," was held a

mere *designatio personarum* and to confer a life estate only.]

(o) 1 B. & P. 243.

(p) Eyre, C. J., reasoned upon the word "such," as if it meant such sons before mentioned; but the expression was "such male issue as my said son shall or may have." The word, therefore, evidently had reference to the succeeding words of the context.

[(q) For an instance of the words being so construed, see *Allgood v. Blake*, L. R., 7 Ex. 339, 8 Ex. 160.]

the son of B in the lifetime of his father, so that the words were read as importing heirs *apparent* of the body, a mode of construction which seems to bring the case into direct collision with *Doe v. Perratt* in regard to the nature of the estate conferred by the devise, and upon this point *Whitelock v. Heddon* (but which, unfortunately, was not cited in *Doe v. Perratt*), must be considered as overruled.

Where a testator has thrown into the description of heir an additional ingredient or qualification, the devisee must answer the description in both particulars. Thus a devise to the right heirs *male* of the testator, or to the right heirs of *his name*, is, according to the early cases, to be read as a devise to the heir, provided he be a male, or provided he be of the testator's name (as the case may be); and, consequently, on the principle just stated, if the character of heir should happen to devolve to a *person not answering to the prescribed sex or name, the devise would fail.⁷

Thus, in *Ashenhurst's Case*, (r) where the devise was to the *right heirs male* of the testator forever; it was held both in B. R. and in the Exchequer Chamber, that, as the testator died leaving no other issue than three daughters, (who were, of course, his heirs general,) the devise failed, and did not apply to his next collateral heir male.

So, in *Counden v. Clerke*, (s) where a testator, having issue a son and daughter, and two grand-daughters the issue of his daughter, devised an annuity out of certain lands to his grand-children, and a legacy to his brother; and then declared that the lands should descend unto his son, and if he died without issue of his body, then to go

7. So in *Thorpe v. Thorpe*, 8 Jur. (N. S.) 871, 10 W. R. 778, 32 L. J., Exch. 79, where a remainder was given "to my own right heirs of the name of H. T.," a great-nephew of that name (and the nearest of that name) could not take, his grandfather being the nephew and heir-at-law of the testator. And see *Theobald on Wills* 164; 1 *Powell on Dev.* 312. "Right heirs" means simply "heirs," 1 *Washb. on Real Prop.* 72. In *Keeler v. Keeler*, 39 Vt. 550, a devise "to my male heirs-at-law who may then live in S.," was construed to mean "such of testator's male relatives living in S. as would be his

heirs-at-law supposing them to be all the relatives the testator had on earth." In *Gibbon v. Gibbon*, 40 Ga. 562, a devise of a reversion to testator's "*heirs of the full blood*" was construed to mean his statutory heirs inclusive of his widow. The words "*full blood*," having no application here, would have excluded half blood if testator had only left collateral heirs.

(r) Cited *Hob.* 34.

(s) *Moore* 860, pl. 1181, *Hob.* 29. See also *Starling v. Ettrick*, Pre. Ch. 54; *Lord Ossulston's Case*, 3 Salk. 336, 11 Mod. 189, Co. Lit. 25 a; [*Dawes v. Ferrers*, 2 P. W. 1, 8 Vin. Ab. 317, pl. 13, Pre. Ch. 589.]

"Right heirs of my name and posterity." unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his grand-daughters he devised another annuity out of the land. The question was, whether the devise to the right heirs of his name and posterity was a good devise to the testator's brother, who was of his name, but was not his heir. It was held, that the brother was not entitled, and that the devise was void. (t) [And the principle of these decisions was adopted in *Wrightson v. Macaulay*, (u) where it was held, that under a devise to the testator's "right heirs being of the *name of H.," the person who was his nearest relation of that name, but not his heir, had no claim.]

It remains to be considered how far the doctrine of the preceding cases is applicable to limitations to heirs of *the body*. Sir Edward Coke, (x) lays down the following distinction: "That where lands are given to a man and his heirs females of his body, if he dieth leaving issue a son and a daughter, the daughter shall inherit; for the will of the donor, the statute working with it, shall be observed. But in the case of a purchase, it is otherwise; for if A have issue a son and a daughter, and

Whether devise to heirs of the body, male or female, applies to a person not heir general.

Whether devise to heirs male means heirs male of the body.—(t) But is there not ground to contend that a devise to the heirs male of the testator operates as a devise to the heirs male of *his body*, seeing that it has been long settled that a devise to A and his heirs male, or to A and his heirs female, confers an estate tail special (*Baker v. Wall*, 1 Ld. Raym. 185); and such is likewise the effect of a devise to A for life, and after his death to his right heirs male forever (*Doe d. Lindsey v. Colyear*, 11 East 548); the word "heirs" being in these several cases construed to mean heirs of *the body*. Indeed, the opinion of the court seems to have been in favor of such a construction in Lord Ossulston's Case, 3 Salk. 336, Co. Lit. 25 a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male forever; and the three sons being dead without issue, the whole court held that the brother could

not take as male heir—first, *because a devise to heirs male operates as a limitation to heirs male of the body*, and the brother could not be heir male of the devisor's body; secondly, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law. As the case on the latter ground accords with the antecedent authorities above stated, it would not be safe or correct to treat it as an adjudication on the first point; though, if the court had been called upon to decide the case, it is pretty evident what the decision would have been. The doctrine of these cases was recognized in *Doe d. Winter v. Perratt*, 5 B. & Cr. 65, 3 M. & Sc. 605, 9 Cl. & Fin. 606, where, however, the question before the court was (as we shall presently see) different. [See also *Doe d. Angell v. Angell*, 9 Q. B. 328.

(u) 14 M. & Wel. 214. And see *Thorpe v. Thorpe*, 1 H. & C. 326.]

(x) Co. Lit. 24 b.

a lease for life be made, the remainder to the heirs female of the body of A, and A dieth, the heir female can take nothing, because she is not heir; for she must be heir and heir female, which she is not, because her brother is heir.”⁸

The latter branch of this proposition has been the subject of much controversy. Lord Cowper, in the well-known case of *Brown v. Barkham*, (y) denied it to be law, and so decided; and though the propriety of his determination was questioned by Lord Hardwicke, before whom the case was brought by a bill of review, (z) and though Mr. Hargrave has defended the position of his author with his usual acuteness and learning, (a) yet subsequent cases appear to have established, in opposition to Coke’s doctrine, that a limitation, either in a will or deed, to the heirs special of the body by purchase, will take effect in favor of the designated heir of the body (if any) *though he or she be not the heir general of the body*. Thus in *Wills v. Palmer* (b) it was held, that, under a devise in remainder to the heirs male of the body of A, (a person who had no estate of freehold under the will,) the second son of A was entitled as heir *male* of the body, though he was not heir general of the body, which character belonged to a grand-daughter, the child of a deceased elder son.

Heir male of body as purchaser held entitled, though not heir general.

This case was followed by *Evans d. Weston v. Burtenshaw*, (c) in which the same construction was applied to the limitations of a marriage settlement. In this state of the authorities, it seems unnecessary to encumber the present work with a statement of the numerous early cases on the subject, (d) which *(conflicting as they are) cannot exert much influence on a question which has been the subject of three distinct adjudications of a comparatively recent date, all concurring to

8. 1 Powell on Dev. 319, 328; O’Hara on Con. of Wills 300; Hawkins on Wills 170. See also *Thorpe v. Thorpe* (cited in note 7.)

(y) Pre. Ch. 442, 461. [1 Stra. 35, 2 Vern. 729; and see per Hale, C. J., *Pybus v. Mitford*, 1 Freem. 369.]

(z) Amb. 8.

(a) Co. Lit. 24 b, n. (3.)

(b) 5 Burr. 2617.

(c) Co. Lit. 164, a, n. (2.)

(d) The reader who wishes to examine these cases will find the authorities on one side fully stated in Mr. Hargrave’s note

above referred to, and those on the other in Mr. Powell’s Treatise on Devises, Vol. I., p. 319, (3d ed.); these authors having both displayed much industry in the search for cases to support their respective views. It should be observed that Mr. Hargrave’s strictures were written before the cases of *Wills v. Palmer* and *Evans v. Burtenshaw*, and that in many of the cases cited by him the devise was to the heirs general; as to which it is not attempted to impugn the doctrine for which he contends.

support the more convenient and liberal construction. It is probable, indeed, that a judge less abhorrent of technical and rigid rules of construction than Lord Mansfield, would have hesitated to decide as he did in *Wills v. Palmer*, and *Evans v. Burtenshaw*, in the teeth of the high authority of Lord Coke; but it is still more probable that the courts, at the present day, would refuse to set the question again afloat, by attempting to overrule those cases, even if they disapproved of the principle on which they were decided. (e)

And here it may be proper to notice, that, in order to entitle a person to *inherit* by the description of heir male or heir female of the body, it is essential not only that the claimant be of the prescribed sex, but that such person trace his or her descent entirely through the male or female line, as the case may be. Thus it is laid down by Littleton, (f) that "if lands be given to a man and the heirs male of his body, and he hath issue a daughter, who has issue a son, and dieth, and after the donee die, in this case the son of the daughter shall not inherit by force of the entail; for whoever shall inherit by force of a gift made to the heirs male, ought to convey *his descent wholly by heirs male*."

It is otherwise, however, in the case of gifts to the heir male or female by *purchase*; ⁹ for, if lands be devised to A for life, and, after his decease, to the heirs male of the body of B, and B have a daughter who dies in his lifetime, leaving a son, who survives B, (all this happening in the lifetime of A, the tenant for life,) such grandson is entitled, under the devise, as a person answering the description of heir male of the body of B, he being not only the immediate heir of B, (though the heirship is derived through his deceased mother,) (g) but being also of the prescribed sex. (h)

[(e) In *Wrightson v. Macaulay*, 14 M. & W. 231, the court treated Coke's rule on this point as no longer law.]

(f) Sect. 24.

9. Theobald on Wills 164; O'Hara on Con. of Wills 299; Hawkins on Wills 171.

(g) Hob. 31; Co. Lit. 25 b.

(h) This distinction, however, seems to have been lost sight of by Taunton, J., in *Doe d. Winter v. Perratt*, 3 M. & Sc. 594, who on the authority of the above-cited passage in Littleton seems to have considered, that even under a devise to the

heir male of the body *by purchase*, the heir must derive his title entirely through males, and that the male issue of a deceased daughter could not under any circumstances support a claim. The case, however did not raise the point; and others of the learned judges in the same case expressly recognized the distinction stated in the text. [But in *Lywood v. Kimber*, 29 Beav. 38, Romilly, M. R., rejected the distinction. And see 3 Dav. Conv. 347, n. (3d ed.,) on the difficulties involved in the distinction if the devisee takes an estate tail.]

Heir male of the body claiming by descent, must claim through heirs male.

Aliter as to heirs taking by purchase.

*It should be observed, however, that, in *Oddie v. Woodford*, (*i*) which arose on the will of Mr. Thellusson, and also in *Bernal v. Bernal*, (*k*) a devise to male descendants was held to be confined to males claiming through males, and not to comprise descendants of the male sex claiming through females; but in neither of these cases does the rule in question seem to have been impugned, the decision having, in each instance, been founded on the context. In *Oddie v. Woodford*, Lord Eldon dwelt much on the association of the word "*lineal*" with male descendant; the expression being "eldest male lineal descendant." (*l*) The word "*lineal*," indeed, may seem, in strictness, not to materially add to the force of the word "descendant;" but his lordship considered that, having regard to all parts of the will, and to the rule which imputes to a testator an additional meaning for each additional expression, the anxious repetition of the word "*lineal*," in every instance, indicated an intention to confine the devise to persons of male lineage. But though neither Lord Eldon nor Lord Cottenham questioned the rule of construction, which reads a devise simply to the male descendant of A as applying to the male issue of a female line; yet their respective decisions teach the necessity of caution in the application of the rule, and of a diligent examination of the context, before such a hypothesis is adopted. (*m*)

Since, therefore, the son of a deceased female may take by purchase under the description of heir male, it follows that several individuals, as grandsons, may become entitled under a devise to heirs male, or even (as several co-heirs make but one heir) to heir male in the singular. As where a testator devises real estate to the heir male of his body, and dies without leaving any son or daughter surviving him, but leaving grandsons the issue of several deceased daughters, the sons of the several daughters respectively, or, if more than one, the eldest sons of the several daughters, are concurrently entitled, under such *devise, as the heir or heirs male of the testator. Under such circumstances, however, considerable difficulty is occasioned, if the testator has prefixed to the word "heir" any

Devise to heir male may apply to several grandsons.

(*i*) 3 My. & Cr. 584.

(*k*) 3 My. & Cr. 559. [This is rather a decision who shall *inherit*, than who can claim as *purchaser* a legacy given to male children (construed descendants); in which view it agrees with the general rule, that the descent is to be traced

wholly through males.

(*l*) "Eldest" was afterwards held to mean prior in line, not senior by birth, *Thellusson v. Rendlesham*, 7 H. L. Cas. 429 (same will.)

(*m*) See also *Doe d. Angell v. Angell*, 9 Q. B. 328.]

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expression showing that he had in his view a single individual ; as in the case suggested by Lord Coke, (*n*) who says, "If lands be devised to one for life, the remainder to the next heir male of B, in tail, and B hath issue two daughters, and each of them hath issue a son, and the father and the daughters die ; some say the remainder is void for uncertainty ; some say the eldest shall take, because he is the worthiest ; and others say that both of them shall take, for that both make but one heir." ¹⁰ .

A question of this nature was elaborately discussed in *Doe v. Winter v. Perratt*, (*o*) where a devise in remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family ;" the facts being that, at the date of the will in 1786, and the death of the testator in 1787, the uncle was dead, leaving five daughters, of whom the eldest died before the remainder fell into possession (which happened in July, 1820,) leaving several daughters, one of whom (who was living) had a son born in 1795 ; [the uncle's second daughter (who was also living) had a son born in 1763, and the fourth (who was dead) a son born in 1768. It was agreed, both in B. R. and in D. P., that the devisee must be a single individual ; but as to the meaning of the word "first," the only point decided was that the second daughter's son, though first in priority of birth, was not the first male heir within the meaning of the will. (*p*) That construction

(*n*) Co. Lit. 25 b.

10. Theobald on Wills 165. And a devise over on death of first devisee without "issue male" will be defeated by his having grandsons by a daughter, *Beckam v. De Saussure*, 9 Rich. L. 531.

(*o*) 5 B. & Cr. 48 ; [in D. P., 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

(*p*) This was the only question before the H. of L. on appeal in ejectment, on the demise of the second daughter's son.] In favor of the claim of the stock of the eldest daughter, some reliance appears to have been placed on *Harper's Case*, which is thus stated in *Hale's MSS.*, Co. Lit. 10 b n. (2):—"Harper, having a son and four daughters, namely, A, B, C and D, devises to the son in tail, remainder to B and C for life, remainder *proximo consanguinitatis et sanguinis* of the devisor ; and

in Easter, 17 James, by two justices against one, the remainder vests in all the daughters when the son dies without issue ; but afterwards, *Michaelmas*, 20 James, *per totam curiam*, it vests in the eldest daughter only, and not in all the daughters : first, because *proximo* ; secondly, because an express estate is limited to two of the daughters." *Perriman v. Pierce*, Palm. 11, 303, 2 Roll. Rep. 256 ; *nom.* *Perin v. Pearce*, Bridg. 14, O. Bendloe 102, 106. It was also observed, that though the course of descent among females is to all equally, yet that for some purposes the elder is preferred, as in the case of an advowson held in co-parcenary, in which the first right to present is conceded to the elder ; and so under a partition made by a third person among parceners, in which the elder has the choice of several lots.

was upheld indeed by two of the judges, but opposed by nine others; of whom two favored the claim of the eldest daughter's grandson as being first in priority of line; five, with *Lord Brougham, were of opinion (*diss.* Lord Cottenham and six judges) that the son of the fourth daughter was entitled, because, by the decease of his mother, he had first acquired the character of male *heir*, in the strict sense of the word, (*g*) while the remaining two held the will void for uncertainty.] (*r*)¹¹

It is clear, that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, *nemo est hæres viventis*. Therefore, where (*s*) *Nemo est hæres viventis.* a man having two sons, devised lands to the younger son and the heirs of his body, and, for want of such issue, to the heirs of the body of his elder son, and the younger died without issue in the lifetime of the elder; it was held, that the son of the elder could not take under the devise. (*t*)

The great struggle, however, in cases of this nature, has generally been to determine whether the testator uses the word "heir" according to its strict and proper acceptation, or in the sense of heir apparent, or in some inaccurate sense.¹²

[(*g*) As to this, see next paragraph.

(*r*) "Heir of a family" was said to be an expression not known to the law; but, in *Horsefield v. Ashton*, 1 W. R. 259, Lord Cranworth was of opinion that a devise in remainder to the "heir of the testator's family" was not void for uncertainty. See also *Tetlow v. Ashton*, 20 L. J., Ch. 53, 15 Jur. 213.]

11. In *Ashton v. Ashton*, 1 Dall. 4, a devise to "*the first male heir*" of A was construed to pass the estate to a son of A born after testator's death—the words being held equivalent to "first son." And in *Jordan v. Adams*, 6 C. B. (N. S.) 748, affirmed in Exch. Ch., 9 C. B. (N. S.) 483, by a divided court, a remainder to "the heirs male of A's body" as "their father" (A) may appoint, was held to mean A's sons. So in *Canedy v. Haskins*, 13 Metc. 389, a devise to A "and to his *eldest male heir* and after his decease and to said male heirs and assigns forever," A having no children at date of testator's will, was held to be words of purchase, giving

A only a life estate.

(*s*) *Challoner v. Bowyer*, 2 Leon. 70. See also *Archer's Case*, 1 Co. 66; [*Anon.*, *Dyer*, 99 b, pl. 64; *Frogmorton d. Robinson v. Wharrey*, 2 W. Bl. 728, 3 Wils. 125, 144.]

(*t*) It will be observed that the failure of the devise in this case was a consequence of the rule which required that a contingent remainder should vest at the instant of the determination of the preceding estate. [But see now 40 and 41 Vict., c. 33, *ante* p. *874.]

12. In *Heard v. Horton*, 1 Denio 165, a devise to "*the heirs of*" a person mentioned in the will as living, was construed to mean "*heirs apparent*." So also 1 Powell on Dev. 315; *Moore v. Littel*, 41 N. Y. 66 (affirming 40 Barb. 488); *Cosbey v. Lee*, 2 Disney, 460; *Bacon v. Fitch*, 1 Root, 181; *Harris v. Philpot*, 5 Ired. Eq. 324; *Vannorsdall v. Vandeventer*, 51 Barb. 137; *Knight v. Knight*, 3 Jones Eq. 169; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Feltman v. Butts*, 8 Bush 115. So

Sometimes the context of the will shows that he intends the person described as heir to become entitled under the gift in his ancestor's lifetime; the term being used to designate the heir apparent, or heir presumptive. (*u*) As, in *James v. Richardson*, (*x*) where a man devised lands to A and his heirs during the life of B, in trust for B, and, after the decease of B, to the *heirs

Heir when construed to mean heir apparent.

"heirs" has been construed "*heirs apparent*" in cases where the ancestor was living at the time the will was made, but that fact did not appear in the will, *Morton v. Barrett*, 22 Me. 257; *Jourdan v. Green*, 1 Dev. Eq. 270; *Flint v. Steadman*, 36 Vt. 210; *Cox v. Beltzhoover*, 11 Mo. 142; see also *Flood on Wills* 73; and in a deed to the "joint heirs of A and B," *Holeman v. Fort*, 3 Strobn. 66; and a note to "heirs of A," *Lockwood v. Jessup*, 9 Conn. 275. See also *Fearne on Con. Rem.* 209, and note (*a*) by Smith. So in devise to testator's heirs on death of A, who died before testator, *Morton v. Barrett*, 22 Me. 257; or to A's heir on death of B, and B died before A, *Mitchell v. Mitchell*, 2 Gill 230. But in *Den Stith v. Barnes*, 1 Law Repos. (N. C.) 484, a devise to the heirs of testator's sister, she being then living, was held to be void, and the rule was declared to be that testator's intention to designate "heirs apparent" by the word "heirs" must appear in the will itself. So also *Otis v. Prince*, 10 Gray 581. And a devise to testator's heirs is construed not to mean his heirs apparent or presumptive at the time of making his will, but his legal heirs at the time of his death, *Wood's Appeal*, 18 Penna. St. 478. So after a life estate to testator's widow a remainder "to the nearest and lawful heirs" was held to intend those who should be the widow's heirs at her death, and not her heirs apparent, *Reinders v. Koppelman*, 68 Mo. 482. In *Quick v. Quick*, 6 C. E. Gr. (N. J.) 13, a devise to A for life—remainder to B for life—remainder to A's "heirs to be divided among them as the law directs," gives the final remainder to those who would have

been A's heirs at the time of the execution of the will, the law referred to in the will being the law as it then was, and not as changed at the testator's death.

Difference between an heir apparent and heir presumptive.—(*u*) The reader scarcely need be reminded of the difference between an heir apparent and an heir presumptive. An heir apparent is the person who will *inevitably* become heir in case he survives the ancestor. The heir presumptive is a person who will become heir in the same event, provided his or her claim is not superseded by the birth of a more favored object. Thus, if a man has an eldest or only son, such son is his heir apparent. If he has no child, but has a brother or sister, or any other collateral relation, such relation is his heir presumptive, because liable to be postponed by the birth of a child; so, if his only issue be a daughter, such daughter, being liable to be superseded by an after-born son, is heir presumptive. [If the ancestor dies intestate leaving a daughter, and his wife *enceinte* who is afterwards delivered of a son, the daughter takes the rents accrued due in the meantime, *Richards v. Richards*, Joh. 754.]

(*x*) *T. Jon.* 99, 1 Vent. 334, 2 Lev. 232, 3 Keb. 832, Pollex. 457, Raym. 330; [*Burchett v. Durdant*, on same will, Skin. 205, 2 Vent. 311, Carth. 154. See also *Rittson v. Stordy*, 3 Sm. & Gif. 230. Where the person was otherwise clearly designated, his being an alien, and consequently (before 33 Vict., c. 14, § 2) incapable of holding land, did not alter the construction, *S. C.*]

male of the body of 'B *now living*, and to such other heirs male or female as B should have of his body, the words "heirs male of the body now living" were held to be a good description of the son and heir apparent, living at the time of the making of the will, to which period the word "now" was considered to point. (y)

So, in *Lord Beaulieu v. Lord Cardigan*, (z) a bequest of personal estate to the heir male of the body of A, to take lands in course of descent, being followed by a gift in default of such heir male to A himself for life, the testator was considered to have explained himself to use the words "heir male" as descriptive of the son or heir apparent.

Again, in *Carne v. Roch*, (a) where a testator gave his real and personal estate to the *heir-at-law* of A, and in case such heir-at-law should die without issue, then he devised the same to the *next heir-at-law* of A, and his or her issue, and in case all the *children* of A should die without issue, then over. A was living at the date of the will, and at the death of the testator; and it was held, that her eldest son had an estate tail under the will.

In this case, it was probably considered, that the testator had, by the word "children," explained himself to use the words "heir-at-law" as synonymous with *eldest son*. And this construction has prevailed in some other cases where the indication of intention was less decisive and unequivocal.

As, in *Darbishon d. Long v. Beaumont*, (b) where the testator, after creating various limitations for life and in tail, devised his estates to the *heirs male of the body of his aunt E. L. lawfully begotten*, remainder to the testator's own right heirs; *he also gave £100 to his said aunt E. L.*, and £500 to her children; he likewise gave to D (who was his heir-at-law) an annuity out of the said hereditaments, and a legacy to her children. The prior limitations determined in the lifetime of E. L., upon which the question arose, whether A, the eldest son of E. L., could take; to whose claim it was objected, that, his mother being living, he was not heir. But it was adjudged in the Exch., which judgment (after being reversed in the Exch Ch.) was ultimately affirmed in D. P., that A was entitled under this devise; it being evident from the whole will, that the eldest son

Heirs male
"now living."

"Heir at law,"
held to mean
eldest son by
force of context

Remark on
Carne v. Roch.

"Heir" held to
mean heir ap-
parent.

(y) *Ante*, p. *318.

(z) *Amb.* 533.

(a) 4 M. & Pay. 862, 7 Bing. 226.

(b) 1 P. W. 229, 3 B. P. C. Toml. 60,
et vid. *James v. Richardson*, *ante*, p. *71.

was the person designed to take by the appellation of the heir male of the body *of the testator's aunt E. L.; and that although the word "heir," in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living: that the testator took notice that the sons of E. L. were living at that time, by giving them legacies, and also that E. L. was likewise living, by giving her a legacy; (c) and, therefore, he could not intend that the first son should take strictly as heir, that being impossible in the lifetime of the ancestor; but, as heir apparent, he might and was clearly intended to take.

So, in *Goodright d. Brooking v. White*, (d) where the testator, after devising certain life annuities to three daughters, and an annuity to M., another daughter, during the joint lives of herself and the testator's only son R., gave the estate (subject to the annuities) to his daughter M. for two years, with remainder to R., his son, for ninety-nine years, if he should so long live; and subject thereto, he devised the same to R.'s heirs male, *and to the heirs of his daughter M.*, jointly and equally, to hold to the heirs male of R. lawfully begotten, and to the heirs of M. jointly and equally, and their heirs and assigns forever; and for want of heirs male lawfully begotten of the body of R., at the time of his decease, the testator devised the same, charged as aforesaid, to the heirs and assigns of M. lawfully begotten of her body, to hold to the heirs and assigns of M. forever. R., the son, had at the date of the will, a son and two daughters; and M., the testator's daughter, then had one son. R. died in the lifetime of M. It was contended, that the devise to the heir of M. was void, his mother being alive at the expiration of the preceding estates; but the court held, that her son was entitled. De Grey, C. J., said, that the testator took notice that M. was living, *by leaving her a term and a subsequent annuity*, and meant a present interest should vest in her heir, that was, her heir apparent, during her life. Blackstone, J., thought that, as the testator had varied the tenure of M.'s annuity from that of the other sisters, *theirs* depending on their own single lives, and *hers* on the joint lives of herself and her brother R., it was plain the testator had in his contemplation that *she might survive R.*, as, in fact, she did; and, therefore, the word *heir*

"Heirs" held
to mean
heir apparent
by force of
context.

(c) But might not the testator have calculated on E. L. surviving him, and afterwards dying before the remainder to her heir took effect in possession?

[This and the next case were disapproved by Lord Brougham, 9 Cl. & Fin. 693.]

(d) 2 W. Bl. 1010.

must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeably to the intent of the testator.

*In *Doe d. Winter v. Perratt*, (e) a testator devised lands to his kinsman, John Chilcott, or his male heir, and, in default of male heir by him, directed the lands to fall *to the first male heir* of the branch of his (the testator's) uncle, Richard Chilcott's family, paying unto such of the daughters of the said R.

"To first male heir of the branch of R. C.'s family."

Chilcott, as should be then living, the sum of £100 each, at the time of taking possession of the said estates. John Chilcott died without issue. R. Chilcott was dead when the testator made his will, having left five daughters, several of whom (including the eldest) died before the remainder fell into possession. The eldest daughter left several daughters, one of whom had a son, who was the only male descendant of the eldest daughter. Each of the other deceased daughters left sons, and each of the living daughters had also sons, some of whom were born before the grandson of the eldest daughter. The question between these several stocks was, which of them was entitled under the denomination of "first male heir." Holroyd and Littledale, JJ., held that the son of the daughter *who first died* leaving male issue was entitled: *dissentiente* Bayley, J., who was of opinion that the son of the *eldest of the daughters*, who had a son, was entitled, whether such daughter were living or dead, and without regard to the relative ages of the sons of the several daughters; thinking that "heir" here meant heir apparent of the eldest daughter. The case was brought by writ of error into the House of Lords; and the house submitted to the

"First male heir" held to mean male descendant.

judges the question (among others,) whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living. [Four out of ten judges (namely, Littledale, Maule, and Coltman, JJ., and Parke, B.) answered this question in the negative, thereby supporting the judgment of K. B., and with them agreed Lord Brougham. The opinion of the other six judges (Taunton, Bosanquet, Bayley, Patteson, Williams, JJ., and Tindal, C. J.,) with whom Lord Cottenham concurred,] was in the affirmative; and this opinion was founded on the circumstances of the testator's knowledge of the state of his uncle Richard's family; that his uncle was then dead; that he had left no heir male, but only daughters;

(e) 5 B. & Cr. 48; in D. P., 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

that legacies were given to such of the daughters as should be living when the remainder vested, to be paid by the person who was to take under the description of "first male heir," not "of my daughters," or "of daughters," or of any one daughter specifically, but "of *the branch of my uncle Richard Chilcott's family ;" all of which it was considered amounted to a demonstration that the testator used the word "heir" to denote a person of whom the ancestor might be living. [It ultimately appeared that the precise point was not before the house, and it was therefore not decided.]

On the other hand, in *Collingwood v. Pace*, (f) where lands were devised to the heir of A and to the heirs of the said heir, "Heir" held not to mean heir apparent. and an annuity was bequeathed to A, for the bringing up A's eldest son ; it was held that A being alive at the testator's death, the devise to his heir failed ; for, though it was strongly argued for the eldest son of A, that by giving A an annuity the testator showed that he expected him to survive, and therefore, the devise being immediate, could not have used the word heir in its technical sense ; yet (it was answered) there was nothing to show in case A's eldest son died in the testator's lifetime, whether a second son was to take ; and that, if the eldest was intended, it might have been so expressed, as it was in another part of the will. •

And, in *Doe d. Knight v. Chaffey*, (g) a devise to husband and wife for their lives, remainder to their son A in fee ; but in case he should die without issue in their lifetime, then to "their next heir" in fee, was held to give the estate to the true heir of the husband and wife, and not to the child born next after A.]

Where a testator shows by the context of his will, that he intends by the term *heir* to denote an individual who is not heir-general, such intention, of course, must prevail, and the devise will take effect in favor of the person described. Thus, if a testator says, "I make A B my sole heir," or "I give Blackacre to my heir male, *which is my brother A B* ;" this is, it seems, a good devise to A B, although he is not heir-general. (h)

[(f) *Bridg. by Ban.* 410. Assuming "heir" to have its proper sense, this devise would at the present day be construed as an executory devise to the person who should be the heir of A at his death, and the testator's heir would be entitled during A's life, the old distinction between gifts *per verba de presenti*

and *per verba de futuro* being now exploded, *Fea. C. R.* 535 ; *Harris v. Barnes*, 4 Burr. 2157.

(g) 16 M. & Wel. 656.]

(h) *Hob.* 33. [See also *Dormer v. Phillips*, 3 Drew. 39 ; *Parker v. Nickson*, 1 D., J. & S. 177.]

Again, (i) it is laid down, that "if a man, having a house or land in borough English, buy lands lying within it, and then, by his will, give his new-purchased lands to his heir of his *house and land in borough English, for the more commodious use of it, such heir in borough English will take the land by the devise as *hærus factus*, not *natus* or *legitimus*; for the intent is certain, and not conjectural: [and it is said, (k) that if a man having lands at common law and other lands in borough English or gavelkind devise his common law lands to his heir in borough English, or heirs in gavelkind, such customary heir or heirs shall take them by the devise, though not heir at common law.]

So, in the case cited by Lord Hale in *Pybus v. Mitford*, (l) where a man having three daughters and a nephew, gave his daughters £2000, and gave the land to his nephew by the name of his *heir* male, provided that, if his daughters "troubled the heir," the devise of the £2000 should be void; it was adjudged that the devise to the nephew was good, although he was not heir-general; (because the devisor expressly took notice, that his three daughters were his heirs;) and that the limitation to the brother's son by the name of heir male was a good name of purchase.

Term "heir" applied by a testator to a devisee.

Again, in *Baker v. Wall*, (m) where the testator, having issue two sons, devised to A, his eldest son, his farm called Dumsey, to him and his heirs male forever; adding, "if a female, my next heir shall allow and pay to her £200 in money, or £12 a-year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male forever." A died leaving issue a daughter only; and the question now was, whether in event, C, the younger son of the testator, was entitled. And the court held, that he was: first, because it was manifest that the devise to A was an estate tail male; secondly, that it was apparent that the devisor had a design that if A had a daughter, she should not have the lands; for the words, "if a female, then my next heir," &c., must be intended, as if he had said, "But if

"Next heir" held to denote a person not heir-general.

(i) Hob. 34. [But a devise of customary lands to the *heir simpliciter* gives them to the common law heir, Co. Lit. 10, a; post p. *78.

(k) Pre. Ch. 464, per Lord Cowper.

(l) 1 Vent. 381.

(m) 1 Ld. Raym. 185, Pre. Ch. 468, 1

Eq. Cas. Abr. 214, pl. 12. See also *Rose v. Rose*, 17 Ves. 347, where the phrase "my heir under this will" was held, in reference to certain pecuniary legacies, to point to the testator's residuary legatee. [See *Thomason v. Moses*, 5 Beav. 77, ante p. *374.]

my son A shall have only issue a female, *then* that person who would be my next heir, if such issue female of A was out of the way, shall have the land :” and, to make his intent more manifest, the testator gave a rent to such female out of the lands ; for she could not have both the land and a rent issuing out of it. By the words “to *him*,” it *was apparent that he intended the *male* heir ; so that it was the same thing as if he had said, “ I mean my next heir male.” And as to the objection, that C. was male, but not heir (for J. D., a female, was right heir to the devisor,) the court said, that if the party take notice that he has a right heir, and specially exclude him, and then devise to another by the name of heir, this shall be a special heir to take.

But in *Goodtitle d. Bailey v. Pugh*, (*n*) (where the devise was to the eldest son of the testator’s only son, begotten or to be begotten, for his life ; and the testator added, “and so on, in the same manner,” to all the sons my son may have ; if but one son, then all the real estate to him for his life, and for want of heirs in him, *to the right heirs of me*

(the testator) forever, my son excepted, it being my will he shall have no part of my estates, either real or personal.”

The testator left his son and three daughters. The son died without issue, having enjoyed the lands for his life. The daughters contended, that they were the *personæ designatæ* under the devise *to the testator’s own right heirs, his son excepted* ; for that the son, who was the proper heir, was plainly and manifestly excluded by the express words. And of this opinion were Lord Mansfield and the rest of the Court of K. B., who held, that the words were to be interpreted as if the testator had said, “Those who would be my right heirs, if my son were dead.” This judgment, however, was reversed in D. P., with the concurrence of the judges present, who were unanimously of opinion that no person took any estate under the will by way of devise or purchase.

This is an extraordinary decision ; and high as is the authority of the court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son (which, it is admitted, would not alone amount to a devise,) but a positive and express disposition in favor of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very

“To the right heirs of me, my son excepted.”

Remarks upon *Goodtitle v. Pugh*.

(*n*) 3 B. P. C. Toml. 454, Butl. Fea. 573, cit. 2 Mer. 348.

faintly the anxiety, generally imputed to judicial expositors of wills, *ut res magis valeat quam pereat*.

[But if a person truly answers the special description contained in the will, the fact that he is also heir-general affords no pretext for his exclusion; and therefore where a testator devised the ultimate interest in his property to his right heirs on the part of his mother, his co-heirs at law, who were also his heirs *ex *parte materna*, were held entitled under the devise. (o) It scarcely requires notice that wherever the heir-general is a descendant, or the brother or sister, or descendant of a brother or sister of the testator, he will be heir *ex parte materna* as well as *ex parte paterna*.

Capacity of special heir not affected by his being general heir also.

It is next to be considered how far the construction of the word "heir" is dependent upon, or liable to be varied by, the nature of the property to which it is applied.

If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a manor in which a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir-general at common law, or his heir *quoad* the particular property which is the subject of the devise; and the authorities, at a very early period, established the claim of the common-law heir; (p) supposing, of course, that there is nothing in the context to oppose the construction.

"Heir" in reference to gavelkind or borough English lands;

[If a testator seized of lands by descent from his mother devises them to his heir, and die leaving different persons his heir *ex parte materna* and his heir *ex parte paterna* (who both claim at common law), the question, which is entitled, will depend on whether the devise is sufficient according to the principles of the old law to break the descent. Thus, in *Davis v. Kirk*, (q) a

—as between *pars paterna* and *pars materna*;

[(o) *Forster v. Sierra*, 4 Ves. 766; *Rawlinson v. Wass*, 9 Hare 673. See *Gundry v. Pinniger*, 14 Beav. 94, 1 D., M. & G. 502.]

(p) Co. Lit. 10 a [devise to heir of stranger]; *Rob. Gavelk.* 117, 118; [*Garland v. Beverley*, 9 Ch. D. 213; *Thorp v. Owen*, 2 Sm. & Gif. 90 (devise in 1841 to heir male of testator); per *Romilly*, M. R., *Polley v. Polley*, 31 Beav. 363 (gift to

heir of stranger of money to arise by sale of borough English lands.) In *Sladen v. Sladen*, 2 J. & H. 369, the claim of the common law heir was fortified by the circumstance that leaseholds were mixed with the gavelkind land in the same set of limitations.

(q) 2 K. & J. 391. The will was dated in 1845, and was therefore subject to stat. 3 and 4 Will. IV., c. 106, § 3—a circum-

testator devised all his real estate (part of which had descended to him *ex parte materna*) to a trustee, his heirs and assigns, upon trust to sell part, and to pay the income of the residue to the testator's widow for life, and after her death "upon trust to convey the said residue unto such person as should answer the description of the testator's heir-at-law." It was held by Sir W. P. Wood, V. C., that the descent was broken by the devise, and that the heir *ex parte paterna* was therefore entitled.]

*With respect to the personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description. (r) Where the gift to the heirs is by way of substitution, the latter construction [generally] prevails.¹³ Thus,

—in reference
to personal
estate, how
construed.

stance noted by the V. C. on a subsequent occasion, 1 J. & H. 674. But that statute appears to give no help in determining who is the person to take, but only, if the heir *ex parte materna* is found to be the person intended, to direct how he takes it.

[(r) *I. e.*, under the statute of distribution; including the widow, *Doody v. Higgins*, 2 K. & J. 729, and cases there cited; but not the husband, *In re Walton's Trusts*, *cor. V. C. Kindersley*, 8 D., M. & G. 174, and cited in *Doody v. Higgins*. As to this see ch. XXIX.]

13. This has also been the construction in the following cases, in which there was simply a gift of personal property to "heirs," without question of substitution: *Ferguson v. Stuart*, 14 Ohio St. 140; *Corbitt v. Corbitt*, 1 Jones Eq. 114; *Kiser v. Kiser*, 2 Jones Eq. 28; *Simms v. Garrot*, 1 Dev. & Bat. Eq. 393; *McCabe v. Spruill*, 1 Dev. Eq. 189; *Stow v. Ward*, 2 Dev. Eq. 509; *Freeman v. Knight*, 2 Ired. Eq. 72; *Croom v. Herring*, 4 Hawks 393; *Henderson v. Henderson*, 1 Jones L. 221; *Evans v. Godbold*, 6 Rich. Eq. 26; *Rusing v. Rusing*, 25 Ind. 63; *Scudder v. Van Arsdale*, 2 Beas. 109; *Sweet v. Dutton*, 109 Mass. 589; *Gibbons v. Fairlamb*, 26 Penna. St. 217, including husband; *Baskin's Appeal*, 3 Penna. St. 304; *Mace v. Cushman*, 45 Me. 250; *Eddings v. Long*, 10 Ala. 203; *Nelson v. Blue*, 63 N. C. 659;

Bailey v. Bailey, 25 Mich. 185; see too *Houghton v. Kendall*, 7 Allen 76; *Lombard v. Boyden*, 5 Allen 249. So where the testator directs that after conversion "the balance of my estate be equally divided among my heirs," *Welsh v. Crater*, 5 Stew. Eq. 177.

And with words of substitution in *Wright v. M. E. Church*, Hoffm. Ch. 202; *Richardson v. Martin*, 55 N. H. 45, not including wife unless intention appears; *Gardinsire v. Hinds*, 1 Head 402, excluding husband; see also 2 Redf. on Wills 62-64, and notes; *Hawkins on Wills* 92; *Theobald on Wills* 167; 1 *Rop. on Leg.* 93; *O'Hara on Con. of Wills* 303. In *Walker v. Dunshee*, 38 Penna. St. 439, a remainder "to my right heirs and the right heirs of my wife" went to the next of kin. So *Chester v. Phillips*, *In re Peppitt*, 36 L. T. R. (N. S., 1877,) 500—the testator's widow being included. In other cases, where legatees have been already designated in the will, legacies to "heirs" of testator have gone to his "legatees." *Collier v. Collier*, 3 Ohio St. 369; but see *Scudder v. Van Arsdale*, 2 Beas. 109, where it is held that the testator's intention to that effect must plainly appear in the will. In *Akers v. Akers*, *Zabriskie, C.*, expresses the rule to be that "the word heirs, when applied to personal property alone, is often held to mean the legatees in

in *Vaux v. Henderson*, (s) where a testator bequeathed to A £200, "and, failing him by decease before me, to his heirs;" the legacy was held to belong to the next of kin of A living at the death of the testator. [And a similar decision was made in *Gittings v. M'Dermott*. (t) Of this case Lord St. Leonards observed (u) that the gift over was "to prevent a lapse. The argument was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so when the testator spoke there by way of substitution, of the heir of the body, it was understood that he meant the same person who would have taken after him in case there had (*qu.* not) been a lapse." This principle has since been followed in other cases, (x) including one where real estate was combined with personalty in a gift to the testatrix's sisters as tenants in common for life, or until marriage, with survivorship, and upon the death or marriage of all "to be divided in equal shares between my brothers and sisters then living or their heirs;" it was held by Sir C. Hall, V. C., that this limitation to heirs, by way of substitution, contained within itself that which required that the property should go to heirs upon whom the property would devolve by law, that is to say, as to the real estate the heir-at-law, and as to the personalty the statutory next of kin according to the statute of distribution. (y)

the will, and when applied to both real and personal estate to mean both *legatees and devisees*;" see also *Cross v. Cross*, 2 C. E. Gr. (N. J.) 288. See also *Ex parte Artz*, 9 Md. 65, in which case a gift to testator's heirs, "as above mentioned" was limited to heirs of testator, who had been already specifically mentioned in the will. And a bequest of residue, "to be equally divided amongst the whole of my heirs already named in this my will," is construed to include only such legatees as would have been heirs and not strangers in blood. *Porter's Appeal*, 45 Penna. St. 201; *Townsend v. Townsend*, 25 Ohio St. 477. So a legacy to be divided among "my heirs not heretofore mentioned" will go to those taking under the statute of distributions not already *beneficially* mentioned in the will, *McCabe v. Spruil*, 1 Dev. Eq. 189. In *Lord v. Bourne*, 63 Me. 368, a residuary gift to testator's "legal

heirs" after a life estate given to his wife was construed to go to the heirs in the legal and technical sense of the word, and not to include the wife. In this case, *Mace v. Cushman*, 45 Me. 250, above cited, is spoken of as having been overruled. A like provision, giving residue to testator's "lawful heirs," was similarly construed not to include the wife in *Bailey v. Bailey*, 25 Mich. 185.

(s) 1 J. & W. 388, n.

[(t) 2 My. & K. 69.

(u) *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 557.

(x) *Doody v. Higgins*, 9 Hare App. 32, 2 K. & J. 729; *Jacobs v. Jacobs*, 16 Beav. 557; In re *Porter's Trusts*, 4 K. & J. 188; In re *Phillips' Will*, L. R., 7 Eq. 151; *Finlason v. Tatlock*, L. R., 9 Eq. 258; *Parsons v. Parsons*, L. R., 8 Eq. 260 (perpetual personal annuity.)

(y) *Wingfield v. Wingfield*, 9 Ch. D. 658.

So in *In re Newton Trusts* (z) where a testator bequeathed one-seventh of his personal estate "to my brother A, his heirs and *assigns forever," another seventh "to my brother B, his heirs and assigns forever," and so on, and the remaining seventh "to the heirs and assigns forever of my late sister C *now deceased*:" it was held by Sir W. P. Wood, V. C., that this last was *quasi* substitutional and went to the next of kin; that by the previous gifts the testator showed how he supposed personal estate would devolve, and wished to put the representatives of C in the same position as if C had been alive, and her share had thus devolved from her.

"Heirs of the body" construed next of kin being issue.

Where the substituted gift is to heirs of the body such of the next of kin will be entitled as are descended from the *propositus*, *i. e.* issue. (a)

Again, a direction to divide a legacy amongst the heirs of the testator or another person indicates an intention to give current interests to several; which can seldom be satisfied by understanding "heirs" in its primary sense, (under which one person will, with rare exceptions, be entitled to the whole;) but which will generally be satisfied by construing "heirs" to mean next of kin. Thus in *In re Steevens' Trusts* (b) where a testator directed his trustees to divide a sum of money "amongst the heirs of my late brother J. S.," (J. S. being dead leaving one person his heir and the same person and others his next of kin), it was held by Sir J. Bacon, V. C., that "heirs" meant next of kin. And in *Low v. Smith*, (c) where a testator gave all his real and personal estate upon trusts which implied conversion, (d) and to be divided among his nephews, grand-nephews and nieces, the several shares to be invested and the income applied for their maintenance until the age of twenty-one, "except my grand-nephew A, and he only to receive the interest of his portion until the age of thirty. Afterwards if my executors think him capable of using

(z) L. R., 4 Eq. 171. A gift to the heirs and assigns of A has been held to give A a general power of disposition, *Quested v. Michell*, 24 L. J., Ch. 722: (see also per Shadwell, V. C., *Waite v. Templer*, 2 Sim. 542; and cf. *Brookman v. Smith*, L. R., 6 Ex. 291, 305, 7 Ex. 271); and will sometimes be words of limitation where "heirs" alone would have described a legatee by substitution, *In re Walton's Estate*, 8 D., M. & G. 173.

(a) *Pattenden v. Hobson*, 22 L. J., Ch. 697, 17 Jur. 406; *Price v. Lockley*, 6 Beav. 180 (children held entitled as "heirs lawfully begotten," but whether as children or next of kin does not appear.) See also *In re Jeaffreson's Trusts*, L. R., 2 Eq. 276, stated below.

(b) L. R., 15 Eq. 110.

(c) 25 L. J., Ch. 503, 2 Jur. (N. S.) 344.

(d) By the trust to invest all the shares, see *Affleck v. James*, 17 Sim. 121.

one-half in his business, let it be done, the remaining half to be continued in the stocks the income of which he is to receive during his life, and at his death to be *equally divided* among his legal heirs." It was held by Sir R. T. Kindersley, V. C., that at the death of A his share went to his next of kin.

In the former of these two cases the decision has the additional support of the circumstance that A was, to the testator's knowledge, actually dead at the date of the will, leaving one *person his heir and several his next of kin. It must, however, be admitted that in neither case were the grounds to which they are here referred distinctly alluded to by the court. In *re Steevens' Trusts* the V. C. treated the authorities as hopelessly confused; while in *Low v. Smith* the court relied on the cases of substitution already noticed, and adverted particularly to the form of the gift, which was in the first place to the grand-nephew, as one of the class, absolutely, and was then restricted for the sole apparent purpose of better securing the benefit of it to the legatee himself. (e)

The effect of words of distribution is more clearly exemplified in *In re Jeaffreson's Trusts*, (f) where personalty was bequeathed to trustees in trust for A for life, and after her death "for the benefit of the heirs of the body of A, first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of twenty-one in such proportions as A might by deed or will" appoint. Sir W. P. Wood, V. C., held that the words "heirs of the body" were not used in the technical sense of all descendants *ad infinitum* and did not operate as words of limitation so as to give an absolute interest to A, (g) but indicated the interests of a set of persons co-existing, and that the next of kin of A descended from her and living at her death were entitled. (h)

In *re Gamboa's Trusts*, (i) where a testator bequeathed a legacy "to

(e) See *White v. Briggs*, 2 Phil. 583; *Powell v. Boggis*, 35 Beav. 535.

(f) L. R., 2 Eq. 276.

(g) See ch. XLIV.

(h) See also *Bull v. Comberbach*, 25 Beav. 540, stated below. In *Ware v. Rowland*, 15 Sim. 587, 2 Phil. 635, Shadwell, V. C., expressed an opinion that under a gift at the death of A to "my heirs-at-law share and share alike" the heir proper was entitled. But as A was both heir-at-

law and sole next of kin the point did not arise. The words "share and share alike" were referred to in argument for the purpose only of showing that A, a known individual, could not have been intended to take either as heir-at-law or next of kin, and that the words imported a class to be ascertained at the death of A; as to which *vide post*.

(i) 4 K. & J. 756.

"Heirs" explained by reason given for making the bequest.

the heirs of his late partner for losses sustained during the time that the business of the house was under my sole control," Sir W. P. Wood, V. C., held that the next of kin according to the statute were entitled, founding his decision on the expressed reason of the bequest, which would be unmeaning if the testator intended to benefit the heir strictly so called. "Had it been 'to the heirs of my late partner' simply," added the V. C., "I should not have felt so clear upon the point."

And here may be noticed a case where a bequest of personalty to "the heirs or next of kin of A deceased" was held to be a *gift to the next of kin of A according to the statute of distribution: "or" not signifying an alternative between two classes (which would have made the gift void for uncertainty,) but the one description being explanatory of the other. (i)

It need not be pointed out that in all the foregoing cases special grounds were assigned for departing from the proper sense of the word *heirs*; and they will] not be understood to warrant the general position that the word *heirs* in relation to personal estate imports next of kin, especially if real estate be combined with personalty in the same gift; ¹⁴ which circumstance [though not conclusive, (k) yet] according to the principle laid down by Lord Eldon in *Wright v. Atkyns* (l) affords a ground for giving to the word in reference to both species of property the construction which it would receive as to the real estate if that were the sole subject of disposition.

"Heirs," unexplained, strictly construed in bequests of personalty.

A fortiori where realty and personalty combined.

(i) In *re Thompson's Trusts*, 9 Ch. D. 607.]

14. If the gift is both of real and personal property, the "heirs" will generally be construed to be the heirs-at-law and not the next of kin, *O'Hara on Int. of Wills* 303; 1 *Rop. on Leg.* 93; *Theobald on Wills* 167; *Hawkins on Wills* 92, n.; 2 *Redf. on Wills* 63; *Wms. Ex'rs* (6th Am. ed.) 1100, note (l); *Hackney v. Griffin*, 6 Jones Eq. 383. But in *Aspden's Estate*, 2 Wall, Jr., C. C. 368, a devise of real and personal property to testator's "heir-at-law," he having no real property but what had been confiscated by a law of Pennsylvania, regarded by him as invalid, was construed to pass his personal

property alone to his *heirs*. And a legacy in remainder to "the lawful heirs of" A was construed literally to be his heirs and not his next of kin, for want of words plainly showing a different intent, in *Cushman v. Horton*, 59 N. Y. 149.

[(k) See *Wingfield v. Wingfield*, 9 Ch. D. 658, stated *sup.*; and per Lord Cottenham, *White v. Briggs*, 2 Phil. 590.]

(l) *Coop.* 111, 123. See also *Pyot v. Pyot*, 1 Ves. 335, where, however, the words of the will being applicable rather to personalty, the construction which obtains in regard to this species of property predominated as to both real and personal estate.

Thus in *Gwynne v. Muddock* (*m*) where a testator gave all his real and personal estate to A for life, adding, after her death, "To my nighest heir-at-law to enjoy the same;" Sir W. Grant, M. R., held that the heir-at-law took both the real and personal estate, not the realty only, the testator having blended them in the gift. [Here it will be observed the word used was *heir* in the singular. So in *Tetlow v. Ashton*, (*n*) where a testator devised and bequeathed his real and personal estate, upon failure of certain previous limitations, to the heir-at-law of his family whosoever the same might be; Sir J. K. Bruce, V. C., said "The testator has used words which no person, professional or unprofessional, can misunderstand. * * * If there were any correcting or explanatory context the case might be different. I give no opinion how the case would have stood if the word 'heirs' had been used instead of 'heir.'" And he held that the next of kin had no color of title.

In *De Beauvoir v. De Beauvoir*, (*o*) the word used was "heirs" in the plural. A testator devised his estates in the funds of England, and his freehold, copyhold, and leasehold property to *several persons and their sons in strict settlement, remainder to his own right heirs; and empowered his trustees to invest the residue of his personal estate in the purchase of freehold land, to be settled to the same uses. It was held by Sir L. Shadwell, V. C., and on appeal by D. P. that the intention to be collected from the whole will, especially from the power to invest, was to give both realty and personalty, as a blended property, to the same set of persons throughout, and that the whole property therefore went ultimately to the heir-at-law. Lord St. Leonards, after stating the general rule as to personal estate, (*p*) said, (*q*) "Then we come to the mixed cases. I quite agree that as to them the argument is still stronger against the appellant (the next of kin), for if the law is settled when you can collect the intention, as regards personal estate, the argument that it is so must, *a fortiori*, have more operation when you come to blend property, consisting of real and personal estate; for as to so much of the

Ultimate remainder to "my own right heirs."

(*m*) 14 Ves. 488.

[(*n*) 20 L. J., Ch. 53, 15 Jur. 213.

(*o*) 15 Sim. 163, 3 H. L. Cas. 524. See

also *Boydell v. Golightly*, 14 Sim. 327.

In *Macpherson v. Stewart*, 28 L. J., Ch.

177, a direction to trustees to invest the

testator's property for the benefit of his heirs was held to mean persons entitled under the will.

(*p*) *Vide inf.* p. *84.

(*q*) 3 H. L. Cas. 557.

property which consists of real estate, there can be no doubt but the person who is described as 'heir' is intended to take in that character. You, therefore, at once in speaking of heir impress upon the gift, or upon him who is to take it, his own proper character—that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labor under in the more naked case of personal property, and having found that the testator meant what he has expressed as regards that portion which is real property, you may more readily infer the same intention as regards the other portion of the same gift depending upon the same words, and you, therefore, allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone."

So in *Henderson v. Green* (r) where a testator devised and bequeathed to his daughter a house and the interest of £800 for her life, and if she died leaving issue he directed £500 to be paid to them, and that the remainder, that is £300, and the house, should revert to his next lawful heirs; it was held by Sir J. Romilly, M. R., that the case was within *De Beauvoir v. De Beauvoir*, and that the heir, and not the next of kin, was entitled to the house and the £300.]

And even where the entire subject of gift is personal, the *word "heir," unexplained by the context, must be taken to be used in its proper sense. [Thus it is laid down, (s) that if one devise a term of years to J. S., and after his death that the heir of J. S. shall have it; J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the executor of that heir shall have the remainder of the term. So, in *Danvers v. Lord Clarendon*, (t) where a testator bequeathed all his goods in C^house to A for life, and after her death to the heir of Sir J. D.; the only question raised was whether he that was heir of Sir J. D. at the time of his death or at the time of A's death was entitled.]

Nor will the construction be varied by the circumstance, that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir. (u) Thus, under the words "to my heir £4000," three co-heiresses of the testator were held

(r) 28 Beav. 1. See also *In re Dixon*, Clinch, 27 L. J., Ch. 651, 4 Jur. (N. S.). 4 P. D. 81. 428; *In re Rootes*, 1 Dr. & Sm. 228.]

(s) *Shep. Touch.* 446.

(u) See 2 Ld. Raym. 829.

(t) 1 Vern. 35. See also *Southgate v.*

to be entitled; Sir J. Leach, M. R., observing, "Where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir.'" (v)

[And although the word used, in a gift of personal estate only, is "heirs," (x) in the plural, it will, unless explained by the context, retain its proper sense.] Sir R. P. Arden, in *Holloway v. Holloway*, (y) was strongly disposed to construe it next of kin; though his opinion on another question rendered the point immaterial. [But in *De Beauvoir v. De Beauvoir*, (z) Lord St. Leonards did not approve of this construction. He reviewed the authorities, and without distinguishing between those where the word used was "heir," and others where it was "heirs," said, "As far as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform—to give to the words the sense which the testator himself has impressed *upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as *persona designata*. It is impossible to lay down any other rule of construction."

"Heirs," in the plural, similarly construed.

One of the authorities noticed by Lord St. Leonards was *Pleydell v. Pleydell*, (a) where a testator, after making several contingent dispositions of a sum of money, gave the ultimate interest to his own right heirs (in the plural;) and it was held that the testator's heir was entitled, not his executor.

And in *Smith v. Butcher*, (b) where personalty was given in trust to be equally divided amongst "the children of A during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs;" it was held by Sir G. Jessel, M. R., that the words

To several for life, "and on the death of either to his lawful heir or heirs."

(v) *Mounsey v. Blamire*, 4 Russ. 384. 113; but see 15 Sim. 593.]

[Jessel, M. R., is reported, 10 Ch. D. 114, to have disapproved of this case: but the context would seem to indicate that what he disapproved of was the half-admission, made *arg. gr.* by Sir J. Leach, that in cases of succession "heir" means next of kin.

(y) 5 Ves. 403.

[(z) 3 H. L. Cas. 524, 557, disapproving of *Evans v. Salt*, 6 Beav. 266, which nevertheless has since been sometimes cited as law, 25 L. J., Ch. 504; L. R., 15 Eq. 114; *sed qu.*, see 29 Beav. 198.

(a) 1 P. W. 748.

(x) "Heirs-at-law" has been thought less flexible than "heirs," L. R., 15 Eq. v. Mills, 29 Beav. 193 (deed.)]

were not, by analogy to the rule in Shelley's Case, to be read as words of limitation, and that neither the next of kin, nor the legal personal representatives, of a deceased child were entitled to his share, but his heir at law.]

The words "heirs" and "heirs of the body," applied to personal estate, have been sometimes held to be used synonymously with "children"—a construction which, of course, requires an explanatory context. 15

As, in *Loveday v. Hopkins*, (c) where the words: "Item, I give to my sister Loveday's heirs £6000."—"I give to my sister Brady's children equally £1000." At the date of the will, Mrs. Loveday had two

15. "Heirs" construed to mean "*children*," Wms. Ex'rs (6th Am. Ed.) 148; Theobald on Wills, 168. See also *Lee v. Foard*, 1 Jones Eq. 125; *Knight v. Knight*, 3 ib. 167; *Urich's Appeal*, 86 Penna. St. 388, affirming *Urich v. Merkel*, 2 W. N. C. 550; *Ellis v. Essex Bridge Co.*, 2 Pick. 243; *Bowers v. Porter*, 4 Pick. 198; *Vannorsdall v. Vandeventer*, 51 Barb. 137; *Scott v. Guernsey*, 48 N. Y. 106; *Den v. Laquear*, 1 South. 305; *Eby v. Eby*, 5 Penna. St. 461; *Ward v. Stow*, 2 Dev. Eq. 509; *Harris v. Philpot*, 5 Ired. Eq. 324; *Holeman v. Fort*, 3 Strobb. 66; *Thomas v. White*, 3 Litt. 181; *Williamson v. Williamson*, 18 B. Mon. 329; *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *Cosbey v. Lee*, 2 Disney 460; *King v. Beck*, 15 Ohio 559; *Bunnell v. Evans*, 26 Ohio 409; *Rapp v. Matthews*, 35 Ind. 332; *Reddish v. Carter*, 1 Cinc. S. C. R. (Ohio) 283; *Turman v. White*, 18 B. Mon. 560; *Gray v. Bridgforth*, 4 George 312; *Findlay v. Riddle*, 3 Binn. 139; *Bond's App.*, 31 Conn. 183, where a gift to my children and their heirs went to living children and children of those deceased. But see *contra*: *Campbell v. Rawdon*, 18 N. Y. 412 (reversing 19 Barb. 494); also *Timberlake v. Harris*, 7 Ired. Eq. 188, where "heirs of A" are distinguished from "children of B," and the devise to the heirs too indefinite and void. In *Feltman v. Butts*, 8 Bush 115, by a limitation to A for life, and afterward to his "heirs," his children were held to

be intended; so, too, *Demarest v. Hopper*, 2 Zab. 599; *Kennedy v. Kennedy*, 5 Dutch. 185; *Matter of Heaton*, 6 C. E. Gr. 224; so in a gift of remainder to A's living children, "or the heirs of any that may be dead," *Scott v. Guernsey*, 48 N. Y. 106. And in a legacy to A, and if he die without issue, "then to fall back to my heirs to be divided among my children as in my will mentioned," heirs was construed to be synonymous with issue or descendants. *Barnitz's App.*, 5 Penna. St. 264; so, too, *Hawkins v. Everett*, 5 Jones Eq. 44. And "heirs" are frequently construed to mean "issue," where the death of first taker "without heirs" is spoken of. *Terry v. Briggs*, 12 Metc. (Mass.) 17; *Stump v. Findlay*, 2 Rawle 168; *Braden v. Cannon*, 1 Grant Cas. 60; *Jones v. Miller*, 13 Ind. 337; *Bundy v. Bundy*, 38 N. Y. 410; *Hilliard v. Kearney*, 1 Busbee Eq. 221; *Pratt v. Flamer*, 5 Haw. & J. 10. "Heirs of the body" construed to mean "children" or "issue;" *Cushman v. Horton*, 59 N. Y. 149; *Bullock v. Bullock*, 2 Dev. Eq. 307; *Bailey v. Patterson*, 3 Rich. Eq. 156; *Roberts v. Ogbourne*, 37 Ala. 178; *Knight v. Knight*, 3 Jones Eq. 169; *Newkirk v. Hawes*, 5 Jones Eq. 267; *Vaden v. Hance*, 1 Head 300; *Gibson v. Gibson*, 4 Jones L. 425; *Ward v. Saunders*, 3 Sneed (Tenn.) 339. So "Heirs born of A's body," *Shepherd v. Nabors*, 6 Ala. 631. So "Bodily Heirs," *Alston v. Davis*, 2 Head 266.

(c) Amb. 273.

children, one of whom was a married daughter, who afterwards died in the lifetime of the testatrix, leaving three children. Mrs. Loveday was still alive, and her surviving child claimed the legacy. Sir Thomas Clarke, M. R., was clearly of opinion, that the testatrix intended to give the £6000 to the children of Mrs. Loveday, the same as in the subsequent clause to Brady's children, and had not their descendants in view; or if she had, yet as she had not expressed herself sufficiently, the court could not construe the will so as to let them in to take. He, therefore, held the surviving child to be entitled to the legacy.

[And in *Bull v. Comberbach*, (d) where a testator devised lands *to trustees in trust for six persons equally for their lives, and after the death of all, in trust to sell the land and divide the money equally "amongst their several heirs," Sir J. Romilly, M. R., held that heirs meant children. He said; "I am at a loss to conceive why he should direct the property to be sold, except for the purpose of division amongst a larger class than the tenants for life; he does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct that after their deaths it shall be sold for the purpose of division." And added, "Where there is a gift of personalty to one for life, and after his death *amongst* his 'heirs,' I should have no doubt that the expression 'heirs' would apply to children."

This construction is equally applicable to a devise of real estate. Thus, in *Milroy v. Milroy*, (e) where a testator, after giving a life interest to his daughter, and directing that after her death the proceeds of his real and personal estate should be applied for the benefit of her children during their minority, and that afterwards the personalty should be assigned to them, ordered his trustees to convey his freehold and leasehold estates to "the heir or heirs who should be legally entitled to the same;" but, in case his daughter left no children, he gave all the property over; Sir L. Shadwell, V. C., thought the words "heir or heirs" evidently meant the children of the daughter.

Same construction applied in the case of real estate.

[(d) 25 Beav. 540. No claim was made for next of kin other than children. See also *Roberts v. Edwards*, 33 Beav. 259. So, "heirs of the body," *Symers v. Jobson*, 16 Sim. 267; *Gummoe v. Howes*, 23 Beav. 184. In *Fowler v. Cohn*, 21 Beav. 360, "heirs" was construed issue in a power to appoint among "the children of A and their heirs for such estates," &c. (e) 14 Sim. 48. See also *Micklethwait v. Micklethwait*, 4 C. B. (N. S.) 790. And compare *Spence v. Handford*, 27 L. J. Ch. 767, 4 Jur. (N. S.) 987.

What is the period at which the object of a devise to the heir is to be ascertained, is a question of frequent occurrence, in the determination of which, the rule that estates shall be construed to vest at the earliest possible period consistent with the will, bears a principal part. An immediate devise to the testator's own heir vests, of course, at his death, and the interposition of a previous limited estate to a third person does not alter the case. Thus, in *Doe d. Pilkington v. Spratt*, (f) where a testator devised to his son A and M his wife, and B and N his wife, or the survivor of them, for their lives, with remainder to the male heir of him the said testator, his heirs and assigns forever, the remainder was held to vest at the testator's death in his eldest son C, who was his male heir-at-law at that time.¹⁶

On the same principle an executory gift to the heir of another *person vests as soon as there is a person who answers that description, namely, at the death of the person named; and if the gift is postponed till the determination of a limited interest given to a third person, still the death of the *propositus* is the time for ascertaining the person of the devisee. Thus, in *Danvers v. Earl of*

(f) 5 B. & Ad. 731. See also *per* Bayley, J., *Doe v. Martyn*, 8 B. & Cr. 511.

16. In *Whitney v. Whitney*, 14 Mass. 88, there was a devise to testator's widow for life or widowhood, and then "to be distributed in the same manner as though it had not been devised." This was held to vest the reversion in the testator's heirs living at the time of his death. So also *Childs v. Russell*, 11 Metc. 16; *Seabrook v. Seabrook*, *McMull. Eq.* 206; *Abbott v. Bradstreet*, 3 Allen 591; *Daggett v. Slack*, 8 Metc. 450; *Buzby's Appeal*, 61 Penna. St. 114; *Brown v. Lawrence*, 3 Cush. 390; *Peppitt, re*, 36 L. T. R. (N. S.) 500 (1877.) So a trust for relief of testator's heirs, *Smith v. Harrington*, 4 Allen 566. So a devise in tail with remainder "to my right heirs and the right heirs of my wife," *Walker v. Dunshee*, 38 Penna. St. 439. And a direct devise to testator's "legal heirs" gives to those who are heirs at the time of his death, although legislation subsequent to the making of the will may have made change in the

persons to take, *Wood's Appeal*, 18 Penna. St. 478; *Ramsey's Estate*, 1 Am. L. Reg. 94; *Aspden's Estate*, 2 Wall, Jr., C. C. 368. And in *Donohue v. McNichol*, 61 Penna. St. 73, a devise to testatrix's son (and only heir) A for his life, and if he die leaving issue to pay income to them, and after their death over to testatrix's "lawful heirs," was held to give fee simple to A as testatrix's heir at the time of her death, and not to her nephews and nieces who were her heirs on A's subsequent death without issue. But in *Johnson v. Jacob*, 11 Bush 646, a devise to testator's heirs in reversion, after a life estate to A, was held not to vest until A's death; so also *Rich v. Waters*, 22 Pick. 563; *Evans v. Godbold*, 6 Rich. Eq. 26. So a remainder to testator's heirs on the death of A without issue, *Sears v. Russell*, 8 Gray 86. But in like case the gift was held to vest at testator's death, in *Newkirk v. Hawes*, 5 Jones Eq. 267. See also *Welsh v. Crater*, 5 Stew. Eq. 177.

Clarendon, (g) where goods were bequeathed to A for life, remainder to the heir of B, B having died in A's lifetime, the question was, whether the person to take the remainder was he who was B's heir at his death or at the death of A, and judgment was given in favor of the former.¹⁷

This case also shows, that though the rule which requires the earliest possible vesting of an interest so given in remainder is, in a great measure, founded on a reason applicable only to legal estates in real property; namely, that it is (or was) in the power of the owner of the prior particular estate to defeat a contingent remainder; (h) yet that the rule also holds good generally with regard to personal property for the purposes of the present question.

Same rule as to real and personal estate.

And since a departure from the rule leads to frequent inconveniences, slight circumstances or conjectural probability will not prevent an adherence to it. Thus it is not enough, that the heir has an express estate in the same property limited to him in a previous part of the will. In *Rawlinson v. Wass*, (i) under a devise in trust for the testator's daughter (who was his heir-at-law) for life, remainder as she should appoint, and, in default of appointment, for the testator's heirs and assigns, as if he had died

Previous devise to the heir out of same property no cause for an exception

[(g) 1 Vern. 35.]

17. In *Richardson v. Wheatland*, 7 Metc. 169, a devise to A and her husband for their lives, and "at their death to be divided among the heirs of A"—A surviving her husband—was held to vest in A's heirs at her death. So *Knight v. Weatherwax*, 7 Paige 182; *Reinders v. Koppelman*, 68 Mo. 482. So a devise in trust for "the heirs-in-law of A," *Vinson v. Vinson*, 33 Ga. 454; or to the "heirs of the body" of A, *Roberts v. Ogbourne*, 37 Ala. 178; or to the heirs of A, after life estate in B, vesting at A's death, *Persons v. Snook*, 40 Barb. 144. But in *Tillinghast v. Cook*, 9 Metc. 143, a bequest to testator's widow, and after her death "to the legal heirs of A," was held to vest in A's heirs living at testator's (not widow's) death; so also *Campbell v. Rawdon*, 18 N. Y. 412. And a deed to the heirs of A (living) was held to vest title in A's children then living, to the exclu-

sion of those born after, *Holeman v. Fort*, 3 Strobb. 66. And in *Cruger v. Heyward*, 2 Dessaus. 94, a remainder to the heirs of A and B, (who were living at date of will,) limited after a life estate, was held to include all children of A and B born and to be born; so, too, *Moore v. Littel*, 41 N. Y. 66 (affirming 40 Barb. 488); while in the similar case of *Knight v. Knight*, 3 Jones Eq. 169, a remainder after A's death to the "heirs lawfully begotten of the body of B," was taken exclusively by the children of B *in esse* at A's death, the rule being there stated that where *no time is fixed for distribution*, those answering the description *at testator's death* take. But in *Bullock v. Bullock*, 2 Dev. Eq. 316, all children, including those born after testator's death, took under a gift "to heirs proceeding from the body of A."

[(h) *Vide ante* p. *873.

(i) 9 Hare 673.

intestate, the daughter was held entitled to an immediate conveyance of the estate from the trustees. It is true the words "as if he had died intestate" point expressly to the period of the testator's death, and in an even balance of arguments must weigh in favor of the general rule. (*k*) But this ground was wanting in other cases, in which, nevertheless, the express provision for the heir, though aided by other circumstances, was held insufficient to exclude the general rule. Thus, in *Boydell v. Golightly*, (*l*) where a testator devised real estates in trust for the maintenance of his son J. (who was his heir apparent) during his life, remainder to his sons successively in tail, with remainders over in strict settlement to other persons and their issue, with an ultimate remainder to the testator's right heirs; *and power was given to the trustees to limit a jointure to any wife of J., and to raise portions for his children; the intermediate remainders having failed, it was argued, that the testator had clearly shown an intention that his son J. should not take the fee, not only by the express provision for him, but by the subsequent clauses in the will; but Sir L. Shadwell, V. C., held, that there was no such indication of intention as he could act upon, to prevent the estate vesting in the testator's heir at his death.

Again, in *Wrightson v. Macaulay*, (*m*) where a testator devised an estate to his son R. (who was his heir apparent) for life, and after several intermediate limitations, remainder in default of issue of the last devisee "to the male heir who should be in possession of and lawfully entitled for the time being to the estate at M. for his life, remainder to his issue, and for default of a male heir being in possession and entitled to the M. estate, at the time thereinbefore for that purpose mentioned, or in default of issue male of such heir male, then to his own right heirs, and *his, her and their* heirs and assigns forever." It was contended, upon the determination of all the estates preceding the ultimate remainder, that the express provision for R., the words of contingency introducing the ultimate devise, and the words "his, her or their" applied to the testator's heir, terms which he could not mean to apply to his own son and heir, showed that the testator referred to some future period for the ascertainment of the heir entitled under the will; but it was held that the evidence of such an intention was not

(*k*) *Doe v. Lawson*, 3 East 278; *Jenkins v. Gower*, 2 Coll. 537; *Smith v. Smith*, 12 Sim. 317; *Southgate v. Clinch*, 27 L. J., Ch. 651, 4 Jur. (N. S.) 428.
 (*l*) 14 Sim. 327.
 (*m*) 14 M. & Wel. 214.

clear enough to control the rule of law, and that the remainder vested in R. immediately on the testator's decease.

But in *Doe d. King v. Frost*, (n) where a testator devised lands to his son W. (who was his heir apparent) in fee, and if he should have no children, child or issue, "the said estate is, on his decease, to become the property of the heir-at-law, subject to such legacies as W. may leave by will to the younger branches of the family;" and it appeared that at the date of the will, the testator had a daughter who had five children; it was held that the person who at the time of the decease of W., without issue, should then be the heir-at-law of the testator, was the person *entitled under the executory devise. This decision was based on the state of the family, to which the testator was thought to be specifically referring, and on the consideration that W. himself could not have been meant, since that would make the executory devise nugatory, and the power to give legacies unnecessary.

What is sufficient to cause a departure from the rule.

Of course, if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time.] (o) 18

Devise to the person who shall be heir at a future time.

(n) 3 B. & Ald. 546. (The gift over was held to be an executory devise in the event of the son dying without leaving issue at his death, *post* ch. XLI.) See also *Locke v. Southwood*, 1 My. & C. 411; *Cain v. Teare*, 7 Jur. 567; and the analogous cases on devises and bequests to next of kin in the next chapter.

[(o) *Wrightson v. Macaulay*, 14 M. & Wel. 214 (answer to second question); *Thorpe v. Thorpe*, 1 H. & C. 326.]

18. It may be added that a gift is often made by will to the heirs of two or more different persons, or to one and the heirs of another. In these cases a distinction as to the proportions taken will depend upon whether the ancestor be living or dead at the time of testator's death. In the former case, his heirs will take *per stirpes*; in the latter, *per capita*, 2 Prest. on Est. 21-26; 2 Redf. on Wills 34.

Thus in *Ricks v. Williams*, 1 Dev. Eq.

1, a gift to A, B, C, D and "the heirs of E," one-fifth went to E's heirs, they taking *per stirpes*; and to the same effect, see *Balcom v. Haynes*, 14 Allen 204; *Tillinghast v. Cook*, 9 Metc. 143; or between A and "the children of B," *Hoxton v. Griffiths*, 18 Gratt. 574. So, also, *Rand v. Sanger*, 115 Mass. 124, in which case there was a residuary devise and bequest "to be equally divided among those persons who shall be my legal heirs at the time of my decease—and in the distribution I direct that the children of my sisters A and B shall share the same equally numerically or *per capita*." Testator's heirs were B (who was living and had seven children) and two children of A (who was dead.) B took one-half, and A's children one-half, *per stirpes*. So it has been held in New Jersey, in *Roome v. Counter*, 1 Halst. 111, in the case of a residuary legacy to A, B, C "and the heirs of D," and

in *Fisher v. Skillman*, 3 C. E. Gr. (N. J.) 229, in a legacy "to be equally divided share and share alike between my children and their legal heirs, that is to say, to A, B, C, D, each a share, and the children and heirs of E and of F and of G each a share;" also in *Wintermute v. Snyder*, 2 Gr. Ch. (N. J.) 489, in a devise "to be divided share and share alike between the heirs of Joseph (deceased,) William and his heirs, and Peter and his heirs," the words "and his heirs" attached to William and Peter, being simply words of limitation, and William, Peter and "the heirs of Joseph" taking equal shares. In the following cases also, the heirs named were held to take *per stirpes*: *Miller's Appeal*, 35 Penna. St. 323, "my two brothers or their heirs," both brothers having died before the testator; *Templeton v. Walker*, 3 Rich. Eq. 543, to the future heirs of my daughter's body; *Britton v. Johnson*, 2 Hill (S. C.) 430, "my children or their heirs;" *Lowe v. Carter*, 2 Jones Eq. 377, "the bodily heirs of my three daughters;" *Burgin v. Patten*, 5 Jones Eq. 426, "to be equally divided amongst my heirs." In *Bassett v. Granger*, 100 Mass. 348, a bequest "to the heirs of my late husband and to my heirs equally," was divided *per stirpes*, each class taking one-half; so, too, *Grandy v. Sawyer*, 1 Phill. Eq. 8. In *Holbrook v. Harrington*, 16 Gray 102, a legacy "to be equally divided between the heirs of A and the heirs of my brothers and sisters," were divided *per stirpes*, A's heirs taking one-half, and the others taking the other half and dividing it among themselves *per stirpes*; so in *Leland v. Adams*, 12 Allen 286, a legacy "to be divided between my grandchildren, namely, my granddaughter A and the grandchildren of my three sons," went half to the granddaughter and half to the others, they also dividing *per stirpes*. In *Daggett v. Slack*, 8 Metc. 450, a devise "to the heirs of A," children and grandchildren (who were children of deceased children,) took *per stirpes*. So to "my

brother A and the heirs of my brother B," *Clark v. Lynch*, 46 Barb. 68; so residue to be divided equally "among the heirs of A, B, C and D," *Spivey v. Spivey*, 2 Ired. Eq. 100; so a reversion, after life estate, to testator's heirs, *Johnson v. Jacob*, 11 Bush 646; or a gift direct to testator's heirs. *Cook v. Catlin*, 25 Conn. 387. So in *Evans v. Godbold*, 6 Rich. Eq. 26, a reversion to testator's heirs, after life estate to A was divided *per stirpes*; see also *Stark v. Hunton*, Saxt. 216.

In the following cases, on the other hand, the heirs took *per capita*: A residuary devise to the "heirs of my brother A, the heirs of my sister B and to my nephew C," *Ward v. Stow*, 2 Dev. Eq. 509; to the heirs of A, (mentioned in the will as living,) *Harris v. Philpot*, 5 Ired. Eq. 324; to the heirs of A, B and C, (mentioned in the will as living,) *Vannorsdall v. Vandeventer*, 51 Barb. 137; to the "lawful heirs of A, B, C and D equally"—A, B, and C dying before, and D after, the testator—A leaving ten children and three grandchildren (by a deceased eleventh child)—B leaving one child and one grandchild (by another child deceased)—C leaving six children and D seven—each child and B's grandchild took a child's share—one twenty-sixth part—and the three grandchildren of A took the other share, that of their parent, *Nutter v. Vickery*, 64 Me. 490. So to A for life, and after her death to the heirs of her body in fee, *Lemacks v. Glover*, 1 Rich. Eq. 141. So in *Ingram v. Smith*, 1 Head 411, a legacy to A for life, with remainder over "at her death to be equally divided between the heirs of my son J. and daughter P.," was divided *per capita*, J. and P. being both dead. So a legacy "to my brother A and sister B's heirs," with other legacy "over and above the said heirs of A and B's heirs," *Harris' Estate*, 74 Penna. St. 452. So a residuary legacy "to my heirs and my wife's heirs to share equally share and share alike," *Witmer v. Ebersole*, 5 Penna. St. 458. So the heirs of A, as a

class, *Campbell v. Wiggins*, 1 Rice Eq. 10. In this case Chancellor Dunkin says, "when the heirs take by purchase, they do not take as heirs, but as a class of persons. When a devise or grant is to a class of persons, who take in their own right, the distribution should be made *per capita*." In *Bunner v. Storm*, 1 Sandf. Ch. 362, a gift "to be *equally* divided among my three daughters A, B and C, and the heirs of my deceased daughter D, viz., *E and F*," was divided *per capita*. So in *Walker v. Dunshee*, 38 Penna. St. 439, a gift "to my right heirs and the right heirs of my wife *as tenants in common*." So in *Hackney v. Griffin*, 6 Jones Eq. 384, a gift "to be *equally* divided between all my legal heirs." And see to the same effect, *Welsh v. Crater*, 5 Stew. Eq. 177. So a residuary legacy "to the heirs of my brother A deceased, the heirs of my sister

B, and the heirs of my sister C," to be equally divided between said heirs, each individual alluded to having an equal portion of the same, *Gold v. Judson*, 21 Conn. 626. So a legacy "to be equally divided between my legal heirs," *Freeman v. Knight*, 2 Ired. Eq. 176; or "among all my heirs," *Tuttle v. Puitt*, 68 N. C. 543; or to "my next heirs in equal shares," *Ortt's Appeal*, 35 Penna. St. 267. The rule may be considered as established that, in a devise to heirs, "the law presumes testator's intention to be that they shall take *as heirs* would take by the rules of descent." C. J. Shaw in *Daggett v. Slack*, 8 Metc. 450; *Rand v. Sanger*, 115 Mass. 124; *Baskin's Appeal*, 3 Pa. (Barr) 304; *Rogers v. Brickhouse*, 5 Jones Eq. 304; *Bailey v. Bailey*, 25 Mich. 185; *Cook v. Catlin*, 25 Conn. 387; *Templeton v. Walker*, 3 Rich. Eq. 543.

*CHAPTER XXIX.

GIFTS TO—

- I. *Family.*
- II. *Descendants.*
- III. *Issue.*
- IV. *Next of kin.*

- V. *Personal Representatives, Executors or Administrators.*
- VI. *Relations.*
- VII. *Persons of Testator's Blood or Name.*

I.—The word *family*¹ has been variously construed, according to the subject-matter of the gift and the context of the will. Sometimes the gift has been held to be void for uncertainty.

As, in *Harland v. Trigg*, (a) where a testator gave leasehold estates to his brother "J. H. forever, hoping he will continue them in the family," Lord Thurlow thought it too indefinite to create a trust, as the words did not clearly demonstrate an object. The testator's brother was tenant for life in remainder, with

1. "*Family*: Father, mother and children—all the individuals who live under the authority of another, including the servants of the family—all the relations who descend from a common ancestor or who spring from a common root," Bouvier Law Dict., vol. I., p. 574. "The word '*family*' when applied to personal property is synonymous with 'kindred' or 'relations,'" 1 Rop. on Leg. 137. "The word '*family*' may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children or his children excluding his wife; or in the absence of wife and children, it may mean his brothers and sisters, or next of kin; or it may mean the genealogical stock from which he may have sprung," 2 Story Eq. Jur. 1065 b. "The description of '*family*' in a bequest of personalty, in its ordinary sense comprises the same persons as 'kindred' or 'rela-

tions.' But this acceptance of the term '*family*' may be narrowed or enlarged by the context of the will, so as in some instances to mean children, or in others heir, or it may even include relations by marriage," 2 Wms. Ex'rs 1213 (*1125.) "The term '*family*' primarily means children, as regards bequests. * * * In devises of realty '*family*' means heirs or heirs of the body. * * * The word '*family*' however will often be construed to mean relatives rather than children. * * * The general meaning of a term obtains of course in wills only where the terms in question are not interpreted by the context," O'Hara on Int. of Wills 317. See also 1 Powell on Dev. 273; Hawkins on Wills 89; Theobald on Wills 160; Flood on Wills 512, 698; 2 Redf. on Wills 71.

(a) 1 B. C. C. 142.

remainder to his issue in strict settlement, of some freehold lands, and the testator had given some other leaseholds to the same uses ; and it was contended, that the leaseholds in question were intended to be subject to the same limitations, so far as the nature of the property would admit ; but his lordship considered that this was not authorized. He said, the testator understood how to make his estates liable to those uses, and intended something different here.

So, in *Doe d. Hayter v. Joinville*, (b) where a testator devised and bequeathed residuary real and personal estate to his wife for life, and, after her decease, one-half to his wife's "family," and the other half to his "brother and sister's family," share and share alike ; and it appeared that, at the date of the will, the testator's wife had one brother who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, it was held, that both the devises *were void, from the uncertainty in each case as to who was meant by the word "family ;" and in the latter case, also, from the uncertainty whether it applied to the family as well of the deceased, as of the surviving sister ; and also whether it referred to the brother's family ; which, however, the court thought it did not.

Again, in *Robinson v. Waddelow*, (c) where a testatrix, after bequeathing certain legacies in trust for her daughters, who were married, free from the control of any husband, for life, and after their decease for their respective children, gave the residue of her effects to be equally divided between her said daughters *and their husbands and families* ; Sir L. Shadwell, V. C., after remarking that, as, in the gift of the legacy, "any" husband extended to future husbands, in the bequest of the residue the word "husbands" must receive the same construction, declared his opinion to be, that such bequest as to the husbands and families was void for uncertainty.²

(b) 3 East, 172.

(c) 8 Sim. 134. ["I cannot say that that case is quite satisfactory to my mind," per Lord Cranworth, V. C., 1 Sim. (N. S.) 246.] See also *Stubbs v. Sargon*, 2 Kee. 253.

2. "If the interest were mere personality, the term, if standing alone, was formerly void for uncertainty. * * * If the interest was realty, the term family was rarely or never void for uncertainty, but

was rather construed to mean heir," O'Hara on Int. of Wills 318. See also *Wms. Ex'rs* (6th Am. ed.) 1120-8; 2 Redf. on Wills 72, where the present rule is declared by Judge Redfield to be that the bequest shall be upheld "if it can be fairly made out what the testator intended by the word family," and to same effect, Hawkins on Wills 89. But in *Neo v. Neo*, 6 L. R. P. C. 381, a devise of houses to be kept for a residence for the families

"The word 'family,'" he said, "is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words 'husbands and families.'" It was accordingly decreed that the daughters took the residue absolutely as tenants in common. (d)

It will be observed, that, in *Harland v. Trigg*, and *Robinson v. Waddelow*, the subject of gift was personal estate; and in *Doe v. Joinville*, it consisted of both real and personal property, and not of real estate exclusively—a circumstance which we shall see has been deemed material.

Sometimes the word *family* or "house" (which is considered as "Family" synonymous with heir. synonymous) has been held to mean "heir."³ A leading authority for this construction is the often-cited proposition of Lord Hobart, in *Counden v. Clerke*, (e) that if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house.

So, in *Chapman's Case*, (f) where C., seized in fee of three houses, devised that which N. dwelt in to his three brothers amongst them, and N. to dwell still in it, and they to raise no ferme; and willed his

of A and B was held too uncertain; and see *Tolson v. Tolson*, 10 Gill & J. (Md.) 159, where a request that devisees "take care of their brother John and his family," was held to designate no individual persons, and to be void for uncertainty. And in *Lambe v. Eames*, 10 L. R., Eq. 267, affirmed 6 L. R., Ch. App. 597, a devise to A, "to be at her disposal in any way she may think best for the benefit of herself and family," was held to be an absolute gift to A, which she could bestow on an illegitimate son of one of her sons; see, however, *Godfrey v. Godfrey*, 2 N. R. 16. In *Walker v. Griffin*, 11 Wheat. 375, a devise "to the families of A and B, children in equal proportions," was held valid, and the children of A and B took *per stirpes*. In *Hill v. Bowman*, 7 Leigh 650, a devise "for the purpose of aiding any of the members of my family who may be in distress," was held sufficiently certain and valid; so for the use of A and her family, *Harper v. Phelps*, 21 Conn. 259.

(d) No doubt the testator's real intention was to assimilate the residuary bequest to the legacies, [so far as the children were concerned]; but the V. C. seems to have considered that this hypothesis savored too much of mere conjecture.

3. It seems to have been the old rule in all *devises of land* to a family or house "that it shall be understood to be the heir principal of the house, for it is doubtful what is the precise meaning of the testator as to which of the stock, family or house should be included as devisees, and therefore, the case being doubtful, the law shall prevail, which always favors the heir, who is considered as the chief, most worthy and eldest of the family," 1 Powell on Dev. 273. So, too, Hawkins on Wills 90; Theobald on Wills 160; O'Hara on Int. of Wills 317; 2 Redfield on Wills 72; 2 Story Eq. Jur., § 1071.

(e) Hob. 29.

(f) Dyer, 333 b.

house that T., his brother, dwelt in, to *him, and he to pay C. £3 6s. to find him to school with, and else to remain to the house: the words "and else to remain to the house" were construed to mean the chief, most worthy, and eldest person of the family. (g)

These authorities were recognized and much discussed in *Wright v. Atkyns*, (h) which was as follows:—A testator devised all his manors, &c., as well leasehold as freehold and copyhold, in certain places, and all other his real estate, unto his mother, C, and her heirs forever, in the fullest confidence that, after her decease, she would devise *the property to his family*. The question was, what estate the mother took. It was contended for her, on the authority of *Harland v. Trigg*, that the word "family" was too indefinite to create a trust in favor of any particular objects, and, therefore, that she took the fee. But Sir W. Grant, M. R., relying on the early authorities before referred to, held, there was no uncertainty in the object. It was a trust for the testator's heir. He said: "Cases relative to personal property, or to real and personal comprised in the same devise, or where the meaning is rendered ambiguous by other expressions or dispositions, will not bear upon this question. In *Harland v. Trigg*, Lord Thurlow doubted whether 'family' had a definite meaning. The authorities above alluded to were not cited. *The case related to leasehold estate*, and it was, by other dispositions in the will, rendered uncertain in what way the testator willed the family to take the benefit of the leasehold estates, it being contended, he meant to give them to the same uses to which the real estate was settled."

On appeal, Lord Eldon admitted the general rule, that, if a man devises lands to A B, with remainder to his *family*, inas-
 much as the court will never hold a devise to be too un-
 certain, unless no fair construction can be put upon it, the
 heir-at-law, as the worthiest of the family, is the person taken to be
 described by that word. But several circumstances embarrassed the
 question in this case; one was, that leaseholds were included, *which*
was not noticed at the Rolls; another was, that it was not a trust sim-
 ply, but a power which might be exercised at any time during the life
 of the donee, before which period the object might be dead; and the
 remaining circumstance was founded on the *objection, why should the

Lord Eldon's
 judgment in
Wright v.
Atkyns.

(g) But was not the word "house" used in the same sense as in the former part of the will, the effect of the clause being merely to declare that the charge should merge or sink in the property which was the subject of the devise? [17 Ves. 257, u.; 19 Ves. 300.]
 (h) 17 Ves. 255.

testator have given this lady a power of devising, if by the words "his family," he only meant his heir-at-law? As to the first of these circumstances, his lordship was of opinion that the word *family*, as had been decided with regard to relations, (*i*) used in a devise of both real and personal estate, must receive the same construction as to both;⁴ and he denied the authority of the case, cited 1 Taunt. 266, in which, under a limitation to the family of J. S., the real estate was held to go to the heir-at-law, and the personalty to the next of kin. In regard to the two other circumstances, he thought they could not vary the construction; (*k*) for it was merely what might happen in the case of a similar power to appoint among relations, where all the relations might die before the exercise of the power, or there might originally be but one relation; and it could not be contended, that these circumstances would make any difference in the construction; and, therefore, not in the present case. (*l*) Lord Eldon, accordingly, affirmed the decree at the Rolls.

In the next case, (*m*) the word *family*, applied to real estate, was construed to mean heir *apparent*. A very illiterate testator devised lands "into my sister C's family, to go in heirship forever;" and it was held, that the eldest son and heir apparent of C. was entitled, though it was admitted that the word "family," in *another* part of the will, and applied to personal property, meant children; the court thinking it no objection, that the same word, when elsewhere applied to a different subject, would receive a different construction.

[In *Griffiths v. Evan*, (*k*) where a testator devised to his daughter

(*i*) Coop. 111, 19 Ves. 299. See also T. & R. 143.

4. In *Ridgway v. Munkittrick*, 1 Dru. & War. 84, Lord Chancellor Sugden says: "It is a well settled rule of construction and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." But Mr. Roper says: "Regularly the person designated by law to take real property on intestacy is the heir; and the persons to take personal property are next of kin.

Hence it seems a consequence when real and personal property are devised together in such a manner as to render it uncertain who are the individuals intended by the description adopted, the law will give the freehold estate to the heir and the personal to the next of kin," 1 Rop. on Leg. 139, citing, with approval, the case in 1 Taunt. 266; see, too, O'Hara on Int. of Wills 319.

[(*k*) 5 Beav. 241.]

(*l*) This is a very brief summary of the judgment, which deserves perusal.

(*m*) *Doe d. Chattaway v. Smith*, 5 M. & Sel. 126.

in tail, with power to her, in default of issue, to appoint to the testator's "nearest family;" it was held, that this was a power to appoint to the heir.

"Nearest family" held to mean heir.

[In *Lucas v. Goldsmid*, (n) where a testator devised real estate, "to be equally divided between my two sons, who shall enjoy the interest thereof, and then go to their respective families according to seniority;" the questions were whether each of the testator's sons took as tenant in common in tail, or for life only, with remainder by purchase; and, if the latter, whether the remainder was to the eldest child in tail, or to all the children; and it was held by Sir J. Romilly, M. R., that the testator's sons were entitled as tenants in common in tail. He said there *was no case relating to real estate *simpliciter* in which the word "family" had not been held to imply inheritance, or that species of succession which belongs to inheritance, or in which "family" had been held to mean "children," as distinguished from children who took by inheritance: the property was to go in the same way that the law would direct, (n) except that it was to go by seniority, that is to say, in tail.

"Family according to seniority" construed heirs of the body.

The declaration that the estate should go according to seniority, distinguishes this case from *Burt v. Hellyar*, (o) where a testator devised his real and personal estate to his wife for life, and after her death "to his son C, and to his heirs; in case C should die leaving no issue, then my freehold estate shall be equally divided among my surviving children or their families." Sir J. Wickens, V. C., held, that "families" meant "children." He thought the nature of the gift made it almost impossible to construe it as meaning anything but descendants, or some class of descendants. The words of division imported a separation between the families, which excluded any such construction as that of heirs general or blood relations generally. It might have meant "heirs of the body," if the testator's object had been to keep an estate together in a particular line; but this was an unnatural construction of the word as there used. If it meant descendants generally, a descendant would take with its parent if alive; which was an improbable intention. His conclusion was that it meant "children," which was in accordance with common usage.]

"Family" construed "children" on the context.

[(n) 29 Beav. 657.

a separation between the families.

(n) Note that the words of division did not (as in the next case) point directly to

(o) L. R., 14 Eq. 160 (will dated 1854.)]

It is evident that the construction, which reads the word "family" as synonymous with *heir*, only obtains where real estate is included in the disposition; it certainly never would be applied to a bequest of personalty only: and with regard to a gift comprehending both real and personal estate, the point is far from being clear; for though Lord Eldon appears, by Sir Geo. Cooper's report of *Wright v. Atkyns*, to have argued (and most convincingly) that the gift was to be construed as if it had actually embraced in its operation both species of property; yet as this is at variance with Mr. Vesey's report of the same case, and as the learned judge, who originally decided it, treated the gift as comprising real estate exclusively, and it was cited as a case of that kind by Lord Ellenborough in *Doe d. Chattaway v. Smith*, (*p*) it cannot confidently be regarded as an authority for *applying the construction in question to a gift comprising both real and personal estate. [Moreover, the doctrine ascribed to Lord Eldon, that the word family used in a devise of both species of property must receive the same construction as to both, was denied by Lord Cottenham in *White v. Briggs*, (*q*), where a testator gave his real and personal property to his wife for life, and after her death, his nephew to be heir to all his property; but, apprehending his nephew might require control, he directed it to be secured for the benefit of the nephew's *family*: the L. C. was of opinion, that the testator's object was simply to secure, against the supposed improvidence of his nephew, the succession to each species of property in the course prescribed by law; and that by the word "family" he intended to designate the heir as to real estate and the next of kin as to personal.]

Sometimes "family" has been construed *children* [with little aid from the context.]⁵ As, where (*r*) a testator devised the remainder of his estate to be equally divided between "brother L.'s and sister E.'s family," it was held, by Sir

Where word "family" used to designate children.

(*p*) 5 M. & Sel. 129. [The case appears to decide that where the principal subject is realty, the construction as to that will not be varied by the presence of personalty: it leaves undecided what will become of the latter.]

(*q*) 15 Sim. 17, 2 Phill. 583. See also *Wingfield v. Wingfield*, 9 Ch. D. 658,

ante p. 79.]

5. Hawkins on Wills 90; O'Hara on Int. of Wills 317; 2 Story Eq., § 1065 b; 2 Redf. on Wills 72; Wms. Ex'rs (6th Am. ed.) 1213. "The courts will apparently lean to the meaning of *children* even in devises of realty, where there is nothing to show that heirs of the body were

(*r*) *Barnes v. Patch*, 8 Ves. 604. See also *M'Leroth v. Bacon*, 5 Ves. 159; and *Doe d. Chattaway v. Smith*, 5 M. & Sel. 126; [*Woods v. Woods*, 1 My. & Cr. 401.]

W. Grant, M. R., that the children of L. and E. took as well the real as the personal estate, *per capita*. In this case, the only questions in regard to the objects of the gift were, whether the children took *per stirpes*, and whether L. and E. were included; both which were decided in the negative.

The word *family* has also been construed as synonymous with *relations*. Thus, in *Cruwys v. Colman*, (s) where a testatrix, after bequeathing her property to her sister [a spinster] for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeath "at her own death, to those of her own family, what she has in her own power to dispose of that was mine." Sir W. Grant, M. R., held, that the expression "of her own family," was equivalent to *of her own kindred*, or *her own relations*; and she, not having exercised the power, it was, therefore, a trust for her next of kin [excluding all beyond the statutory limit.]

*It is observable with respect to the two sets of cases last referred to that where the word "family" was construed to mean children, no one was interested in insisting on its receiving the more enlarged signification of relations; [and on the other hand that where it was construed to mean next of kin, there were no children, (t) and the situation of the parties made it improbable that there should be any, or that the birth of any was contemplated. But later authorities have decided that, in a gift of personal estate to the "family," either of the testator (u) or some other person (x) the primary meaning of the word "family" is "children;" and that there must be some peculiar circumstance, arising either on the will itself or from the situation of the parties, to give it another: (y) so that gen-

Where "family" construed *relations*.

Primary sense of "family" in gift of personalty is children.

intended, and generally with regard to personalty, family *prima facie* means *children*," Theobald on Wills 161. This has also been held in *Whelan v. Reilly*, 3 W. Va. 610. So, too, *Dominick v. Sayre*, 3 Sandf. Ch. 555, where *family* was held to mean *children* in a power of appointment to "any of the male descendants of the family of A;" and in a devise for the use of A and her *family*, it was held to include only blood relations, and to mean A's children, but not her husband, *Heck v. Clippenger*, 5 Penna. St. 388.

(s) 9 Ves. 319. [See also *Grant v. Lynam*, 4 Russ. 292; *In re Maxton*, 4 Jur.

(N.S.) 407. But a trust "for such of her own family" as A (a spinster) should appoint does not confine the selection to statutory next of kin, *Cruwys v. Colman*, 9 Ves. 324; *Grant v. Lynam*, 4 Russ. 292; *Snow v. Teed*, L. R., 9 Eq. 622.

(t) See this circumstance mentioned, as making "children" an improbable construction, by *Romilly*, M. R., 19 Beav. 581.

(u) *Pigg v. Clarke*, 3 Ch. D. 672.

(x) *Wood v. Wood*, 3 Hare 65.

(y) See the other cases cited on this page; and *In re Terry's Will*, 19 Beav. 580; *Reay v. Rawlinson*, 29 Beav. 88

erally children will be entitled to the exclusion of a husband, (z) of a wife, (a) ⁶ of collateral relations, (b) ⁷ and of remoter descendants; and as to these last whether, as representing their deceased parents, they would, (c) or, by reason of their parents being alive, they would not, (d) have participated if "family" had meant relations.]

Every case however must depend upon its particular circumstances. ["Family" is not a technical word, and is of flexible meaning. (e) It may mean ancestors. (f) "In one sense it means the whole household, including servants and perhaps lodgers. (g) In another it means everybody descended from a common stock, *i. e.*, all blood relations; and it may perhaps include the husbands and wives of such persons. (h) In the sense I have just mentioned the family of A includes A him*self; A must be a member of his own family. (i) In a third sense the word includes children only; thus when a man speaks of his wife and family he means his wife and children. Now every word which has more than one meaning has a primary meaning; and if it has a primary

Owen v. Penny, 14 Jur. 359; Morton v. Tewart, 2 Y. & C. C. C. 67, 81. Sir W. M. James, L. J., would appear disposed to comprehend in the *ordinary* meaning of the word persons beyond the limits of the statutes of distribution, Snow v. Teed, L. R., 9 Eq. 622; Lambe v. Eames, L. R., 6 Ch. 597, 600, including in the latter case even an illegitimate child; but the weight of opinion seems to justify the position in the text.

(z) Per Arden, M. R., M'Leroth v. Bacon, 5 Ves. 159.

(a) In re Hutchinson and Tenant, 8 Ch. D. 540.]

6. Hawkins on Wills 90; Theobald on Wills 161; O'Hara on Int. of Wills 317; Wms. Ex'rs (6th Am. ed.) 1213; 2 Story Eq., § 1065 b. In the following cases family has been held to include *wife and children*: Osgood v. Lovering, 33 Me. 464; Addison v. Bowie, 2 Bland 606; Bowditch v. Andrews, 8 Allen 341; Chase v. Chase, 2 Allen 101; Bates v. Dewson, 10 Cent. L. J. 217 (Mass. Sup. Ct., Jan., 1880; in this case a step-son was excluded.) But the *father* is not included in an annuity given him in trust for "his wife and family," Wallace v. McMicken, 2 Disney 564.

[(b) Wood v. Wood, 3 Hare 65.]

7. Theobald on Wills 161; Wms. Ex'rs (6th Am. ed.) 1213; O'Hara on Int. of Wills 318; 2 Redf. on Wills 73; 2 Story Eq., § 1065 b; 1 Rep. on Leg. 140; "relations" or "kindred," Huling v. Fenner, 9 R. I. 411.

[(c) Pigg v. Clarke, 3 Ch. D. 672.

(d) Gregory v. Smith, 9 Hare 708; Burt v. Hellyar, L. R., 14 Eq. 160, *ante* p. *94.

(e) Per Kindersley, V. C., Green v. Marsden, 1 Drew. 651.

(f) Per Romilly, M. R., Lucas v. Goldsmid, 29 Beav. 660. And see James v. Lord Wynford, 3 Sm. & G. 350, whereupon a devise of lands "except such as I may derive from A or from any of her family," A's father was held included in her "family."

(g) But a very improbable sense in a bequest to a man's "family."

(h) See acc. M'Leroth v. Bacon, 5 Ves. 159; Blackwell v. Bull, 1 Kee. 176.

(i) But this is not the general rule in a gift to A and his family, Barnes v. Patch, 8 Ves. 604, *stated sup.*; Gregory v. Smith, 9 Hare 708.

meaning, you want a context to find another. What then is the primary meaning of 'family?' It is 'children:' that is clear upon the authorities which have been cited; and independently of them I should have come to the same conclusion." (k)

In *Williams v. Williams* (l) the context was such as to give to the word family a meaning wider even than relations. The testator by his will bequeathed personal property to his wife absolutely. By a codicil addressed to her he added "using your judgment where to dispose of it amongst your *children* when you can no longer enjoy it; but I should be unhappy if I thought any one not of your *family* should be the better for what I feel confident you will so well direct the disposal of." At the date of his death, which followed soon after the date of his codicil, the testator had two sons and two daughters. The younger daughter was married. His wife was of advanced years and had no children but by her marriage with the testator. In this state of things Lord Cranforth, V. C., held that the words "of your family" as used in the codicil were not confined to children, but were equivalent to "of your blood," that is "your posterity, your descendants;"⁸ so that if there was a trust for the "family," issue of every degree would be included, and parents and children would take together. The improbability that this was intended, coupled with the precatory language of the codicil, led the court to conclude that no trust was intended.]

It should seem, then, that a gift to the *family* either of the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special creating that uncertainty. The subject matter and the context of the will are to be taken into consideration, [and generally where personal estate is given to A and his family, the word "family" will not be rejected as a surplusage, or (which amounts to the same thing) treated as a word of limitation, but will give a substantive interest to the children (m) or other persons indicated.

General remark on preceding cases.

"To A and his family."

*Whether effect can be given to a devise to the "younger

(k) Per Jessel, M. R., *Pigg v. Clarke*, 3 Ch. D. 674.

(l) 1 Sim. (N. S.) 358.]

8. 2 Redf. on Wills 73; see, too, *Taylor v. Watson*, 35 Md. 519, in which case a devise to A, in trust for the support of B "*and his family*," was held to include

not only B's living children, but the child of a deceased child.

(m) *Parkinson's Trusts*, 1 Sim. (N. S.) 242; *Beales v. Crisford*, 13 Sim. 592. On the question whether children take concurrently with their parent, or in remainder, *vide post* ch. XXXVIII., § 1.

Gift to the
"younger
branches," of a
"family."

branches of a family" must of course chiefly depend on the state of the family at the date of the will. In *Doe d. Smith v. Fleming*, (n) where a testator disposed of the ultimate remainder of his estates to the *younger branches of the family of A* and their heirs as tenants in common, and in default of such issue to the elder branches of the same family and their heirs as tenants in common. There were living at the date of the will, and of the testator's death, two daughters of A, four children of one of those daughters and children of two deceased sons of A, and the devise being thus ambiguous was held void. But in *Doe d. King v. Frost*, (o) where a testator devised his real estates to his son W. in fee; but if he should die without issue living at his decease (which happened) to I. S. "subject to such legacies as W. might leave to any of the younger branches of the family:" and it appeared that besides his only son W. the testator had issue one daughter, who at the date of the will had five children; Abbott, C. J., and Bayley, J., agreed that by the term "the younger branches of the family," the testator meant his daughter's younger children; the daughter herself and her eldest son being in the event contemplated successive heirs apparent to W., and therefore excluded from any claim to the legacies.]

II.—A gift to *descendants* receives a construction answering to the

Word "de-
scendants,"
how construed. obvious sense of the term; namely, as comprising issue of every degree.⁹

[(n) 2 C., M. & R. 638.

(o) 3 B. & Ald. 546.]

9. 2 Redf. on Wills 74; Wms. Ex'rs 1202; O'Hara on Int. of Wills 307; Theobald on Wills 157. "Attempts have been made to induce the Court of Chancery to put the same construction upon the word '*descendants*' as upon the term '*relations*,' but the court has constantly refused the application since the principle which applies to the latter case does not apply to the former; for when a bequest is made to '*relations*' unless the court were guided by the statute of distributions in ascertaining the legatees, the disposition would be void from the generality and uncertainty of the term; but when the word '*descendants*' is used, there is no necessity for resorting to the statute to fix or

limit the objects of the bequest, as the natural import of the term is sufficient to include every individual proceeding from the *stock* or *family* referred to by the testator; so that a legacy 'to the descendants of B' will comprehend all his children, grandchildren," &c., 1 Rep. on Leg. 136. "It would seem that the term descendants when used as a word of purchase and coupled with a gift to the ancestor, has a substitutional and representative sense, so that in a gift to several and their descendants, descendants would not take in competition with their ancestor," Theobald on Wills 157. "Descendants are the *posterity* or those who have issued from an individual and include his children, grandchildren and their children to the remotest degree," *Bryan v. Walton*, 2C

In *Crossley v. Clare*, (*p*) a devise of real estate "to the descendants of A now living in or about B, or hereafter living anywhere else," and a bequest of personalty in the same words, were held to apply to all who proceeded from A's body, so that grandchildren [and great grandchildren] were entitled, and a great great grandchild was not included, only because born after the date of the will, the words "*now living*" excluding him. In *Legard v. Haworth*, (*q*) the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

[In *Craik v. Lamb*, (*r*) where a testator gave the residue of his real and personal property "unto and equally amongst all his relations who might prove their relationship to him by ^{"Relations by, lineal descent."} *lineal descent;" it appeared that the testator was a widower, and had no issue, but several first cousins, his next of kin, and it was held by Sir J. K. Bruce, V. C., that, as the testator had not required his devisees to prove their descent from him, he might be understood to mean lineal descent from a common progenitor, and therefore that his cousins were entitled to the residue.

But if the person to whose descendants the gift is made is specified, it would seem to require a strong case to enable collateral ^{Whether col- laterals may be included.} relations to participate. In *Best v. Stonehewer*, (*s*) where a testator devised real estate to his sister B, and two other persons successively for life, and afterwards to be sold, and directed the proceeds to be paid "to such person or persons as shall at the death of the survivor of them be the nearest in blood to me as descendants from my great-grandfather J. S. and whose kindred with me originates from him;" and at the date of the will the only lineal descendants of J. S. were the testator and his sister B, who were both so advanced in years as to make it highly improbable that either of them would have issue; it was held by Sir J. Romilly, M. R., that the testator meant collateral descendants (children and grandchildren of a brother) of J. S., and that this was warranted by legal and popular usage, and by the definition of "descendant" given by Coke and Blackstone. The "definition" referred to however is of "descent," *quoad* real estate, not of

Ga. 480; and to same effect, *Baker v. Baker*, 8 Gray 101; *Hamlin v. Osgood*, 1 Redf. 409; *Barstow v. Goodwin*, 2 Bradf. 413; next of kin, children and grandchildren, *Walker v. Walker*, 25 Ga. 428;

McLure v. Young, 3 Rich. Eq. 559.

(*p*) Amb. 397, [3 Sw. 320, n.]

(*q*) 1 East 120.

[(*r*) 1 Coll. 489.

(*s*) 34 Beav. 66, 2 D., J. & S. 537.

"descendant;" (t) and, it is submitted, affords no ground for concluding that, because an *estate* is properly said to "descend" to a collateral heir, it is proper or customary to speak of a *person* being descended, or being a descendant, from his uncle, his nephew, or his brother. Sir J. K. Bruce, L. J., dissented from the construction put on the will by the M. R.; and it was not approved by Sir G. Turner, L. J., though he upheld the decision on distinct grounds.] (u)

Under a gift to descendants *equally*, it is clear that the issue of every degree are entitled *per capita*, *i. e.* each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent. (x) And even where the gift is to *descendants simply, it seems that the same mode of distribution prevails; unless the context indicates that the testator had a distribution *per stirpes* in his view, as in *Rowland v. Gorsuch*, (y) where the testator, as to the residue of his fortune, willed that the descendants or *representatives* of each of his first cousins deceased should partake in equal shares with his first cousins then alive; Sir L. Kenyon, M. R., considered that the gift applied to first cousins, and all persons who were descendants of first cousins, and who, in quality of descendants, would be entitled, under the statutes of distribution, to represent them. He had some doubt whether they were to take *per capita* or *per stirpes*; but upon the whole, he thought that no person taking as representative could take otherwise than as the statute gives it to representatives, *i. e.* *per stirpes*.¹⁰ [So if descendants are expressly desired to take in the proportions directed by those statutes, they cannot take concurrently with, but only in the place of, their parents.] (z) And in one case, (a) where a testator

Gift to descendants *equally*; they take *per capita*, unless they are to take as "representatives."

—or in the statutory proportions.

(t) Co. Lit. 10 b, 13 b, 237 a; 2 Bl. Com., ch. XIV. If the meaning of a gift to "descendants" is to be determined by the meaning of "descent," it might, since the inheritance act, 1834, include not only collaterals, but father, grandfather, &c.

(u) He read the will (*diss.* K. Bruce, L. J.), as describing, not one set of persons, but two; first, descendants of J. S.; secondly, those whose kindred with the testator originated from J. S.]

(x) *Butler v. Stratton*, 3 B. C. C. 367.

(y) 2 Cox 187.

10. Theobald on Wills 157; Wms. Ex'rs (6th Am. ed.) 1202; O'Hara on Int. of Wills

307; 2 Redf. on Wills 74. But a gift to "the descendants of my three uncles who are all dead and their children or descendants are unknown to me," "to such of their children as are living," and where a child is dead, leaving children, they shall take his share, was divided *per capita* among the fourteen children, three of one uncle, four of another, and seven of another, in *Brown v. Brown*, 6 Bush (Ky.) 648.

[(z) *Smith v. Pepper*, 27 Beav. 86, marginote.

(a) *Tucker v. Billing*, 2 Jur. (N. S.) 483.

gave the residue of his real and personal property to his wife for life, and after her death to the brothers and sisters of himself and his said wife and to their descendants in such proportions as she should by will appoint, an intention was held to be implied that no descendants should take but by substitution for a parent (brother or sister) who died before the wife.

Where the distribution is to be *per stirpes* the principle of representation will be applied through all degrees, children never taking concurrently with their parents. (b) In a case (c) ^{Mode of division *per stirpes*.} where the gift was "to the descendants of A and B *per stirpes*," Sir J. Romilly, M. R., thought A and B were the *stirpes* in the first instance to be considered, so that the primary division should be into two parts. But Lord Westbury held that you must look to the number of families or *stirpes* descended either from A or B and existing at the testator's death, and divide the fund primarily into a corresponding number of parts. However in a subsequent case the M. R. acted on his own opinion, which appears to have been acquiesced in. (d) If the gift were to the descendants of one person, *per stirpes*, it must necessarily be dealt with on Lord Westbury's principle.]

*III.—The word *issue*,¹¹ [though its popular sense is said to be

(b) *Ralph v. Carrick*, 11 Ch. D. 873, stated below.

(c) *Robinson v. Shepherd*, 32 Beav. 665, on app. 10 Jur. (N. S.) 53.

(d) *Gibson v. Fisher*, L. R., 5 Eq. 51. See also *Booth v. Vicars*, 1 Coll. 6.]

11. *Hawkins on Wills* 86; 1 *Rop. on Leg.* 95; *O'Hara on Int. of Wills* 307; *Theobald on Wills* 155; *Wms. Ex'rs* (6th Am. ed.) 1198, and note (x); 2 *Redf. on Wills* 36; *Flood on Wills* 514. See, too, *Miller's Appeal*, 52 Penna. St. 113, in which case an illegitimate daughter, legitimated by statute, was allowed to take a devise to "lawful issue of A;" *Gest v. Way*, 2 *Whart.* 451; *Black v. Campbell*, 10 B. Mon. 193, where "lawful issue" was held equivalent not to "lawful heirs of the body," but to "lawful descendants," excluding illegitimate children, whom law of Kentucky made lawful heirs of the body; see also *Kleppner v. Lavery*, 70

Penna. St. 70, where "issue" was construed to be equivalent to "heirs of body;" and to same effect, *Kingsland v. Rapelye*, 3 *Edw. Ch.* 1; "heirs of the body like 'issue,' include descendants of every degree," *Houghton v. Kendall*, 7 *Allen* 76; *Bigelow v. Morong*, 103 *Mass.* 288 (by stat.); and a devise to "lawful issue" of A construed to mean A's children, *Taylor v. Taylor*, 63 *Penna. St.* 484. So in a devise to A for life, with remainder to his "issue," *Edwards v. Bibb*, 43 *Ala.* 666; "heirs of body" or "children," *Chilton v. Henderson*, 9 *Gill* 432; and in *Allen v. Marble*, 36 *Penna. St.* 117, "offspring" was held to be the same as "issue;" so if A (devisee for life) die without leaving "male issue," was construed to be "male descendants" by a son or daughter, *Beckam v. De Saussure*, 9 *Rich. L.* 531; so "issue" is construed to mean all "descendants," in *Tier v. Pennell*, 1 *Edw.*

Request to "issue," how construed. children, (e) is technically, and] when not restrained by the context, co-extensive and synonymous with descendants, comprehending objects of every degree. (f) And here the distribution is *per capita*, not *per stirpes*.¹² *Davenport v. Hanbury* (g) presents a simple example. The bequest was to M., or her issue. M. died in the lifetime of the testator, leaving one son living, and two children of a deceased daughter. Sir R. P. Arden, M. R., held, that these three objects were entitled *per capita*; and, there being no words of severance, they took as joint tenants.

In *Leigh v. Norbury*, (h) the same mode of construction was applied to a deed. In consideration of an intended marriage, A assigned to trustees all his personal estate, upon trust to permit him to enjoy the same during his life, and after his decease, in trust for such persons as he should appoint, and in default of appointment, for the lawful issue of A. A made no appointment,

Words "lawful issue" held to comprise children and grandchildren. Ch. 354; *Weehawken Ferry v. Sisson*, 2 C. E. Gr. (N. J.) 475; *Price v. Sisson*, 2 Beas. 168; *Corbett v. Laurens*, 5 Rich. L. 301; *Penny v. Clark*, 1 De G., F. & J. 425; *Kavanagh's Will*, 13 Ir. Ch. 120; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Weldon v. Hoyland*, 4 De G., F. & J. 564; *Mitchison v. Buckton*, 23 W. R. 480; *Jeyes v. Savage*, 10 L. R., Ch. App. 555.

[(e) 11 Ch. D. 882, 885.]

(f) *Haydon v. Wilshere*, 3 T. R. 372; *Hockley v. Mawbey*, 1 Ves., Jr. 150; *Wythe v. Thurlston*, Amb. 555, 1 Ves. 195, more correctly 3 Ves. 258; *Horsepool v. Watson*, 3 Ves. 383; *Bernard v. Mountague*, 1 Mer. 434; [Hall v. Nalder, 22 L. J., Ch. 242, 17 Jur. 224; *South v. Searle*, 2 Jur. (N. S.) 390; *In re Jones' Trusts*, 23 Beav. 242; *Maddock v. Legg*, 25 Beav. 531; *Hobgen v. Neale*, L. R., 11 Eq. 48; *In re Corlass*, 1 Ch. D. 460. "Offspring" is synonymous with "issue," see *Thompson v. Beasley*, 3 Drew. 7; read as a word of limitation in a gift to "A and her offspring," *Young v. Davies*, 2 Dr. & Sm. 167, confined to children in an executory trust to settle, *Lister v. Tidd*, 29 Beav. 618. In a bequest to the issue male of A, it was held that the claim must be

wholly through males, *Lywood v. Kimber*, 29 Beav. 38, *vide ante* p. *68, n. (h).]

12. 2 Redf. on Wills 36; Wms. Ex'rs (6th Am. ed.) 1198, n.; issue take *per capita*, *Gest v. Way*, 2 Whart. 451; *Purcell v. Purcell*, Riley L. 282; *Corbett v. Laurens*, 5 Rich. L. 301; so in *Weldon v. Hoyland*, 4 De G., F. & J. 564, where the gift was to the "issue of A equally to be divided among them;" and to like effect, *Hobgen v. Neale*, 11 L. R., Eq. 48 (1870); *Mitchison v. Buckton*, 23 W. R. 480 (1875.) But issue take *per stirpes* in a devise in trust for A, B and C, or their issue, with remainder to survivors on death of either without issue, and on death of survivor remainder to be divided among the issue of A, B and C, "one share to the issue of each," they "to take as tenants in common," *Cushney v. Henry*, 4 Paige 345; so in *Davis v. Bennett*, 4 De G., F. & J. 327, where a residuary gift was "to be equally divided between my two sisters, and the lawful issue of my two deceased sisters, in equal shares, if more than one of such respective lawful issue."

(g) 3 Ves. 257.

(h) 13 Ves. 340.

and died leaving several children, some of whom had children. Sir W. Grant, M. R., held that the property was divisible among all the children and grandchildren *per capita*. He said, it was clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention, he said, was required for the purpose of limiting the sense of that word to children.

*Distribution
per capita.*

In *Freeman v. Parsley*, (i) a testator devised and bequeathed a moiety of his personal estate, and of the proceeds of his real estate (which he directed to be sold), to T., his heirs, &c., to be divided among A, B, C, and D; but in case of their decease, or any of them, such deceased's share to be divided among the *lawful issue* of such deceased, and, in default of such issue, such share to be equally divided among the survivors." B, C, and D died in the testator's lifetime, leaving children and grandchildren. Lord Loughborough held, that all were entitled, *though he expected that it was contrary to the intention. He regretted that there was no medium between the total exclusion of the grandchildren and admitting them to share with their parents. 13

*Gift to issue
extended to
children and
grandchildren.*

It will be perceived that in all the preceding cases the subject of disposition was personal estate, or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word "issue" would not be varied when applied to real estate. It is true, indeed, that the word "issue," when preceded by an estate for life in the ancestor, is frequently construed (as we shall hereafter see) as synonymous with heirs of the body, and as such conferring an estate tail, on the ground that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants born and unborn; and it must be confessed, that the same reasoning applies, to a certain extent, in the case now under consideration; for to adopt any other interpretation narrows the range of objects, by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants, on whom an estate tail would, if not barred, devolve (as in *Mandeville's Case*.) (k) But whatever may be the plausibility or force of such analogical reasoning, it has received but little countenance

*Devise of real
estate to issue.*

(i) 3 Ves. 421.

ed.) 1198, n.; 2 Redf. on Wills 38.

13. Issue construed to embrace children and grandchildren, *Wms. Ex'rs* (6th Am.

(k) *Ante* p. *62.

from the cases; there being, it is believed, no direct adjudication in favor of such a construction, while positive authority may be cited against it: as in *Cook v. Cook*, (*l*) where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

Seeing that the construction which obtained in this case has the merit of letting in all the existing issue concurrently, instead of vesting the property in the eldest or only son, (as would generally be the effect of the alternative construction above suggested,) it seems probable that it will be hereafter followed in a similar case; especially now that, under such a devise (if contained in a will made or republished since the year 1837,) the issue would take the fee.

At all events, if the devise to the issue not only confers an estate in fee, but also contains words of distribution (which are obviously inconsistent with holding the word "issue" to be synonymous with heirs of the body,) it is clear that issue of every degree are entitled as tenants in common.

*Thus, in *Mogg v. Mogg*, (*m*) where, under a devise to trustees, to pay the profits to the children begotten and to be begotten of M. for their lives (which vested the legal estate *pro tanto* in the trustees,) and after the decease of such children, the testator devised the estate to the lawful issue of such children, *to hold unto such issue, his, her, and their heirs, as tenants in common*, without survivorship (and which was held to execute the use *in the issue*,) the Court of K. B., on a case from chancery, certified (*n*) that the issue of such of M.'s children as were *living at the testator's decease took the remainder in fee, expectant on the estate pur autre vie of the trustees, as tenants in common*; and this certificate was confirmed by Sir W. Grant, M. R.

[It is equally clear, on the other hand, that if the context manifests an intention to keep the devised estate together in a single owner, the issue will take successively in tail, as in *Man-deville's Case*. Thus, where by will, dated 1780, a testator devised his "estates" in formally strict settlement to several of his sons and daughters in tail male, "and in default of such issue to all and every other the issue of my body, and for default of such issue to my own right heirs," his desire being "to prevent the dispersion of

"To the issue of J. S."

Remark on *Cook v. Cook*.

Effect where the devise is to the issue as tenants in common in fee.

Effect of express desire to keep estate together.

(*l*) 2 Vern. 545.

(*m*) 1 Mer. 654.

(*n*) See answer to the query, 1 Mer. 639.

his estates, and to keep up his name and family in one person ;” the devise to issue was read as a devise to the heirs of the body.] (o)

The word “issue,” however, may be, and frequently is, explained by the context to bear the restricted sense of *children*. “Issue” explained to mean *children*. A clause substituting issue for their *parents*, it seems, has such effect, the word “parent” so used being considered to import, according to its ordinary meaning, *father* or *mother*, as distinguished from, and in exclusion of, a more remote ancestor.¹⁴

Thus in *Sibley v. Perry*, (p) where a testator made certain bequests to several persons, if living at his decease, and if not, he directed that their lawful *issue* should take the shares which their respective *parents*, if living, would have taken ; and he made other bequests to the lawful issue, living at certain periods, *of other persons ; Lord Eldon thought it was clear, as to the former class, that children were intended, and that this was a ground for giving to the word “issue” the same construction in the other bequests. (q)

[(o) *Allgood v. Blake*, L. R., 7 Ex. 339, 8 Ex. 160. See also *Whitelock v. Heddon*, 1 B. & P. 243, *ante* p. *64.]

14. *Hawkins on Wills* 88 ; *Theobald on Wills* 155 ; 1 *Kop. on Leg.* 97–100 ; *Wms. Ex'rs* (6th Am. ed.) 1198–1202, nn. ; 2 *Redf. on Wills* 39 ; *McGregor v. McGregor*, 1 De G., F. & J. 63 ; *Marshall v. Baker*, 31 Beav. 608 ; *Fairchild v. Bushell*, 32 Beav. 158 ; *Wyndham's Trusts*, 1 L. R., Eq. 290 ; *Bryden v. Willett*, 7 L. R., Eq. 472 ; *Livesay v. Walpole*, 23 W. R. 825 ; *Sander's Trusts*, 1 L. R., Eq. 675. So in a devise “to A's issue by him lawfully begotten of his body,” *Daniel v. Whartenby*, 17 Wall. 639 ; or residuary devise over “if A die leaving no issue or child,” *Hill v. Hill*, 74 Penna. St. 173 ; *King v. Savage*, 121 Mass. 303 ; so in a devise of remainder to “my children's lawful issue,” *Way v. Gest*, 14 Serg. & R. 40 ; so to A for life, and after her death remainder “to her issue,” *Pennock's Estate*, 33 Leg. Int. (Pa.) 290 ; see also *McPherson v. Snowden*, 19 Md. 197 ; so, too, *Burleson v. Bowman*, 1 Rich. Eq. 111, a case precisely similar to *Pennock's Estate*, with addition of the words “to be equally divided among such

issue share and share alike and their issue, and in case of only one child her surviving them, to such only surviving child.”

(p) 7 Ves. 522 ; [*Pruen v. Osborne*, 11 Sim. 132 ; *Buckle v. Fawcett*, 4 Hare 536, 544 ; *Crozier v. Crozier*, 3 D. & War. 386 ; *Bradshaw v. Melling*, 19 Beav. 417 ; *Smith v. Horsfall*, 25 Id. 628 ; *Maynard v. Wright*, 26 Id. 285 ; *Stephenson v. Abingdon*, 31 Beav. 305 ; *Lanphier v. Buck*, 2 Dr. & Sm. 484 ; *Martin v. Holgate*, L. R., 1 H. L. 175 ; *Heasman v. Pearse*, L. R., 7 Ch. 275. But see *Birdsall v. York*, 5 Jur. (N. S.) 1237.

(q) See also *Ridgway v. Munkittrick*, 1 D. & War. 84 ; *Edwards v. Edwards*, 12 Beav. 97 ; *Rhodes v. Rhodes*, 27 Beav. 413. It is not, however, a necessary result of the word “issue” being used in the sense of *children* in one clause, that it is to be similarly construed in another clause, where it is surrounded by a different context, *Carter v. Bentall*, 2 Beav. 551 ; *Head v. Randall*, 2 Y. & C. C. C. 231 ; *Hedges v. Harpur*, 9 Beav. 479 ; *Caulfield v. Maguire*, 2 Jo. & Lat. 176 ; *Williams v. Teale*, 6 Hare, 239. Still less can “issue” be restricted to “children”

[But if in such a case there follows a gift over on a general failure of "issue" of the original legatee, this construction is excluded. Thus, in *Ross v. Ross*, (r) where a testator bequeathed a share of a money fund to his niece C. for life, and after her death to her children living at her death, and the issue then living of children then dead, each surviving child to take an equal share, "and the issue, if more than one," of deceased children "to take equally amongst them the share which their parent would have been entitled to if he or she had survived C., and if but one, then to take a child's share;" the other parts of the fund were then given in similar terms to other nieces and their respective children and issue; "and in case all my said nieces should die without leaving a child or issue of a child living at their respective deaths, then" to sink into the residue. Sir J. Romilly, M. R., recognized the rule deduced from *Sibley v. Perry*, but held that it was inapplicable to the case; for although issue if more than one were to take their *parent's* share, yet if there was but one, that one took, not a *parent's*, but a *child's* share. The collocation of the word "parent" with the word "issue," which was the foundation of the rule, was wanting in this branch of the clause, so that up to this point it was uncertain in what sense the word "issue" had been used. Then came the gift over on general failure of issue, in which *per se* there was nothing to restrict the meaning of the word to children, and which put a construction on what was ambiguous in the previous part of the will. Suppose none but children were entitled under the original gift; then, if you restricted the meaning in the same manner in the gift over, that gift would take effect, and disappoint remoter issue, if any; or if you retained the wider meaning in the gift over, that gift would fail, and there would be an intestacy. It was impossible to suppose the testator *had meant that. The M. R. therefore held that "issue" retained its primary meaning in the original gift. As between a parent and his issue, "issue" meant "children;" but "parent" meant "child" or "grandchild" according to circumstances; so that on the death of a parent of any degree, his children (whether children, grandchildren, or remoter issue of C.) took his share, but not letting in issue of a remoter degree to share with issue less remote. (s) In other words, the

merely to make two different bequests correspond, *Waldron v. Boulter*, 22 Beav. 284.

(r) 20 Beav. 645.

(s) That, where "issue" is unrestricted, issue of several degrees taking by substitution will not take concurrently, see also *Robinson v. Sykes*, 23 Beav. 40; *Amson*

substitution would take place according to circumstances through all the degrees of issue.

So, in *Ralph v. Carrick*, (t) where a testator bequeathed a portion of his residuary personal estate, after the death of his wife, to the children of his late aunt W. equally, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received if alive; and gave the other portions to other aunts and their descendants in like manner; "and should there be no children or lawful descendants of any of my said aunts at the time these bequests should become payable, then the portion destined for such to be placed in the general residuary fund and bestowed as part thereof as above pointed out: (u) *Sir C. Hall, V. C.*, held, that descendants was confined to children by force of the word "parents;" observing that *Ross v. Ross* must be considered an exceptional case and as depending altogether on the peculiar wording of the passage relating to "a child's share." But this decision was reversed by the L.JJ. They thought, indeed, that "descendants" could not be so easily controlled by the context as "issue." But if the words used had been "issue," *Sir W. James* thought it would have been impossible to distinguish the case from *Ross v. Ross*. "Here (he said) we have a gift over all the funds provided for the aunts and their descendants, which gift over is not to take effect except on failure of all the descendants of the aunts; and this appears to me to exclude the limited construction which it is sought to give to the original gift. *That* was decided in *Ross v. Ross*, and it seems to me rightly decided." And *Sir H. Cotton* observed, that in the gift over "descendants" could not be restricted to children, for it was expressly distinguished *from the latter word; and he added, "it is a sound principle, that when there are ambiguous words in the original gift, you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words in the previous gift so as to agree with the unambiguous words contained in the gift over."

Where the gift is to issue, and the testator proceeds to speak of "issue" of that issue, it is clear that he did not, in the first instance, use the word "issue" in its most comprehensive sense; and if he has

v. Harris, 19 Beav. 210; In re *Orton's Trusts*, L. R., 3 Eq. 375; *Gibson v. Fisher*, L. R., 5 Eq. 51. But see *Birdsall v. York*, 5 Jur. (N. S.) 1237.

(t) 5 Ch. D. 984, 11 Ch. D. 873.

(u) This appears to be an effectual disposition of any portion of which the primary trusts failed, see *Atkinson v. Jones*, Joh. 246; and cf. *Lightfoot v. Burstall*, 1 H. & M. 546.

further called the first "parents" of the second, the sense to which the word is limited must be that of "children." (x) Even without the latter circumstance it is difficult to see how, if restricted at all, the term can mean anything but children, (y) unless it means issue living at a particular period.]

Again, in *Hampson v. Brandwood*, (z) it was considered that a limitation in a deed to the first male issue, *lawfully begotten* by A, was restricted to sons; but the construction seems to have been aided by the context, the next limitation being expressly to *daughters*, [and the father having a power, in case there were any such male issue to inherit, to charge the property in favor of his *other children*. It has been frequently decided, that the words "lawfully begotten by A" are not *per se* enough to limit a bequest "to the issue of A" to his children. (a) But in a case upon articles for a settlement on husband and wife successively for life, with remainder to their issue as they should appoint, and in default of appointment, then in equal shares, if there were more than one of such issue, born in the husband's lifetime or *in a reasonable time after his death*, it was held by Sir E. Sugden that the word "issue" meant *children*. (b)

A gift to issue may also be restricted to children by a codicil, (c) or another clause of the will (d) referring to it as a gift to "children."]

Difficulty, however, often arises from the testator having used the words *issue* and *children* synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these terms should be established. *Lord Hardwicke thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution—viz. to each, or their respective *children* one-fourth, followed by a gift to survivors, in case any of them should be dead without issue, the word "children" was not restrictive of "issue" previously mentioned, the *videlicet* being

(x) *Pope v. Pope*, 14 Beav. 593; *Williams v. Teale*, 6 Hare 239; *Fairfield v. Bushell*, 32 Beav. 158.

(y) See per Maule, J., 8 C. B. 880.]

(z) 1 Madd. 381; [*Gordon v. Hope*, 3 De G. & S. 351.

(a) *Caulfield v. Maguire*, 2 Jo. & Lat. 176; *Evans v. Jones*, 2 Coll. 516; *Haydon*

v. Wilshire, 3 T. R. 372. And see *King v. Melling*, 1 Vent. 230.

(b) *Thompson v. Simpson*, 1 D. & War. 459, 480.

(c) *Macgregor v. Macgregor*, 1 D., F. & J. 63.

(d) *Baker v. Bayldon*, 31 Beav. 209; *Marshall v. Baker*, Id. 608 (deed.)]

merely explanatory of the shares to be taken, and not of the objects to take. The word "children," therefore, was to be construed as meaning *issue*, and not "issue" abridged to *children*. (e)

IV.—A devise or bequest to *next of kin* [creates a joint tenancy (f) in the nearest blood-relations¹⁵ in equal degree of the *propositus*; such objects being determined without regard

Gift to next
of kin, how
construed.

(e) *Wyth v. Blackman*, 1 Ves. 196, Amb. 555. See also *Horsepool v. Watson*, 3 Ves. 383; *Royle v. Hamilton*, 4 Ves. 437; *Dalzell v. Welsh*, 2 Sim. 319, stated *post*; *Doe d. Simpson v. Simpson*, 5 Scott 770, 4 Bing. N. C. 333, 3 M. & G. 929, stated *post*; [*Harley v. Mitford*, 21 Beav. 280. In *Cancellor v. Cancellor*, 2 Dr. & Sm. 194, the testator sometimes used both words together, "children and issue," sometimes "children" only, and all degrees were held entitled.] In *Cursham v. Newland*, 2 Scott 105, 2 Bing. N. C. 58, 4 M. & Wel. 104, both words were used indifferently, and "issue" was restrained to *children*. See also *Jennings v. Newman*, 10 Sim. 219; [*Goldie v. Greaves*, 14 Id. 348; *Benn v. Dixon*, 16 Id. 21; *Earl of Oxford v. Churchill*, 3 Ves. & B. 67; *Bryan v. Mansion*, 5 De G. & S. 737; *Farrant v. Nichols*, 9 Beav. 327; *Edwards v. Edwards*, 12 Id. 97; In re *Heath's settlement*, 23 Beav. 193; *Bryden v. Willett*, L. R., 7 Eq. 472; In re *Hopkins' Trusts*, 9 Ch. D. 131, and other cases, *post* ch. XXXIX., § 2, subs. 4.

(f) *Withy v. Mangles*, 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69; *Baker v. Gibson*, 12 Beav. 101; *Lucas v. Brandreth*, 28 Beav. 274 (deed.) In *Dugdale v. Dugdale*, 11 Beav. 402, a bequest, equally among next of kin, both maternal and paternal, was distributed *per capita*, not in moieties between the next of kin *ex parte materna* and *ex parte paterna*. So a gift to next of kin of testator and his wife, *Rook v. Att.-Gen.*, 31 Beav. 313.]

15. 2 Redf. on Wills 75, *et seq.*; Wms. Ex'rs (6th Am. ed.) 1208; Hawkins on

Wills 97; 1 Rop. on Leg. 119; O'Hara on Int. of Wills 319; Theobald on Wills 168; Flood on Wills 303, 698. So, too, *Jones v. Oliver*, 3 Ired. Eq. 369; *Simmons v. Gooding*, 5 Ired. Eq. 382; *Redmond v. Burrough*, 63 N. C. 242; *Brookfield v. Allen*, 6 Allen 585; *Haraden v. Larrabee*, 113 Mass. 431; *Harrison v. Ward*, 5 Jones Eq. 240, a daughter taking exclusive of the children of another daughter deceased. To the same effect is *Harris v. Newton*, 25 W. R. 228, 36 L. T. R. (N. S.) 173, 46 L. J., Ch. D. 268, following *Withy v. Mangles* and *Elmsley v. Young*, cited in the text.

It may be added that in the absence of any reference to the statute of distributions, the next of kin and their degree of kinship are to be ascertained by the rules of the civil law, 2 Kent Com. 333; 2 Redf. on Wills 77.

Next of kin, unless otherwise expressed, includes half-blood as well as whole blood, Wms. Ex'rs (6th Am. ed.) 1208; Theobald on Wills 168; or an adopted child, *Johnson's Appeal*, 88 Penna. St. 346; but not an illegitimate child's *illegitimate* brothers and sisters, in a trust for such illegitimate child, with remainder to "such persons as would be his next of kin under the statute of distributions," *Standley's Estate*, 5 L. R., Eq. 303. Where, however, in a trust for the statutory next of kin, the testator added "and it is hereby declared that A (the daughter of B) shall for the purposes of this trust be deemed to be the lawful child of B," A, though an illegitimate daughter of B was allowed to take as her next of kin, *Wilson v. At-*

to the statutes of distribution. This rule, however, more particularly as it affects the rights] of persons who claim by representation under the express clause of the statute, (g) entitling the children of the brothers and sisters of an intestate to stand in the place of their deceased parents, was the subject of many conflicting *dicta* and determinations. In favor of the claim of these representatives were the *dictum* of Lord Kenyon, (h) and the decisions of Buller, J., (i) and Sir J. Leach. (j) On the other side were ranged the strongly expressed opinions of Lord Thurlow, (k) Lord Eldon, (l) and Sir W. Grant, (m) and a decision of Sir T. Plumer. (n)

*Such was the perplexing state of the authorities prior to Elmsley

Next of kin confined to persons strictly answering to this character.

v. Young, which was as follows:—A fund was settled by indenture, upon trust, after failure of certain previous trusts, for such persons as should, at the decease of A, be his *next of kin*. A died, leaving a brother, and the children of a deceased brother. Sir J. Leach, M. R., held that the children of the deceased brother were entitled to participate in (*i. e.* to take a moiety of) the fund; his opinion being, that the words “next of kin” imported next of kin according to the statutes of distribution. (o) The case was then brought, by appeal, before Lords Commissioners Shadwell and Bosanquet, who, after a full examination of the conflicting authorities, held, that the trust applied to the next of kin in the strictest sense of the term, excluding persons entitled by representation

kinson, 4 De G., J. & S. 455, reversing 33 Beav. 536.

Next of kin of two persons named in the will must be next of kin to both, 2 Redf. on Wills 77, note 26; but where there are no next of kin of both, a remainder “to be equally divided among the next of kin of myself and my said wife,” goes half to the next of kin of each, *Jones v. Oliver*, 3 Ired. Eq. 369; so, “to be divided after my wife’s death amongst our next of kin,” there being no one of kin to both, *Cooper v. Cannon*, 1 Phill. Eq. 83.

“In a gift to the next of kin, as if she had died intestate and unmarried, ‘unmarried’ will be construed as equivalent to ‘without leaving a husband’ since, otherwise, children would be excluded,” *Theobald on Wills* 172; *Day v. Barnard*, 1 Dr.

& S. 351; *Halton v. Foster*, 3 L. R., Ch. App. 505; see also *Norman’s Trusts*, 3 De G., M. & G. 965; *Thistlethwaite’s Trusts*, 31 Eng. L. & Eq. 547; *Clarke v. Colls*, 9 H. L. C. 601; *Lucas v. Brandreth*, 28 Beav. 274.

(g) 22 and 23 Car. II., c. 10, explained by 29 Car. II., c. 30.

(h) *Stamp v. Cooke*, 1 Cox 234.

(i) *Phillips v. Garth*, 3 B. C. C. 64.

(j) *Hinckley v. Maclarens*, 1 My. & K. 27.

(k) *Phillips v. Garth*, 3 B. C. C. 64.

(l) *Garrick v. Lord Camden*, 14 Ves. 372.

(m) *Smith v. Campbell*, Coop. 275.

(n) *Brandon v. Brandon*, 3 Sw. 312.

(o) 2 My. & K. 82.

under the statute, and consequently, that A's surviving brother was entitled to the whole fund. (p) ¹⁶

[So all who are of equal degree will be included in such a gift, though some of them may be beyond the statutory limit.]

Thus in *Withy v. Mangles*, (q) where the question was who was entitled under the ultimate limitation in a marriage settlement in favor of "such person or persons as shall be the next of kin of E. M. at the time of her decease; E. M. died, leaving a child, and also her father and mother, who claimed each an equal share of the property with the child; Lord Langdale, M. R., decided that the parents, though postponed to children by the statutes, were here entitled concurrently with the child, as being of equal degree. "All writers on the law of England (he said) appear to concur in stating, that, in an ascending and descending line, the parents and children are in an equal degree of kindred to the proposed person; (r) and I think that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in an equal degree of consanguinity. The law of England gives a preference to the child over the parent in distribution; but I think we cannot, therefore, conclude with respect to every *distribution of property, made in the words to give the same to persons equally next of kin, the parents are to be held more remote than the child." [The House of Lords affirmed the decision, and thus] finally settled this long-agitated question. (s)

Parents and children, being of kin in equal degree, take together as "next of kin."

[But a reference to the statute, ¹⁷ whether express, (t) or implied

(p) 2 My. & K. 780. [See also *Avison v. Simpson*, Joh. 43; *Halton v. Foster*, L. R., 3 Ch. 505. A gift to "next of kin in equal degree" had been twice held to exclude representatives, *Wimbles v. Pitcher*, 12 Ves. 433; *Anon.*, 1 Mad. 36.]

16. 1 Rop. on Leg. 121; Wms. Ex'rs (6th Am. ed.) 1209; *Hawkins on Wills* 97; *Theobald on Wills* 168; 2 Redf. on Wills 75; *O'Hara on Int. of Wills* 319. And in *Frazier v. Frazier*, 2 Leigh 642, a gift to be distributed by A "among testator's next of kin" went to the statutory next of kin in default of appointment by A; see

also the foregoing note 15.

(q) 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69.

[(r) 2 Bl. Com. 504. The degrees are to be reckoned according to the civil law, *Cooper v. Denison*, 13 Sim. 290; by which law the half-blood stands on equal ground with the whole-blood, *Cotton v. Scarancke*, 1 Mad. 45; *Grievies v. Rawley*, 10 Hare, 63.]

(s) And see *Cooper v. Denison*, 13 Sim. 290 (brothers and sisters admitted with grandchildren.)

17. "There is an important difference

(t) *Nichols v. Haviland*, 1 K. & J. 504. See also 4 Beav. 368.

Secus, where statute of distribution is referred to.

from a mention of intestacy, (u) will admit all kindred who are within the statutory limit. (v) And if a testator describes the objects of gift by express reference to the statute, as next of kin under or according to the statute, and does not expressly state how they are to take, they take according to the mode and in the shares directed by the statute, *sc. per stirpes*, and as tenants in common. (x) This mode of distribution would be excluded by an

between a gift to "next of kin" *simpliciter* and a gift to "next of kin according to the statute;" for while both are technical expressions, the latter points expressly to the law of succession *ab intestato*, while the former points only to the law of consanguinity. The law of succession, as established by the statutes of distributions, prefers some of the true next of kin to others, as the children to the parents of the *propositus*; and admits some who are not, properly speaking, next of kin to take by representation along with those who are," Hawkins on Wills 97; 1 Rep. on Leg. 119; Flood on Wills 556, note i, 698. "A reference to next of kin, as if I had died intestate, means the next of kin according to the statutes," O'Hara on Int. of Wills 319. And where, in a gift to next of kin, the statute is expressly referred to, representatives of those entitled come in, if they take by the statute, Hawkins on Wills 98; Theobald on Wills 169; Wms. Ex'rs (6th Am. ed.) 1208; O'Hara on Int. of Wills 319. It has been generally held that *husband* or *wife* is not included in "next of kin" without reference to the statute, Hawkins on Wills 99; Theobald on Wills 169; Flood on Wills 697; 2 Redf. on Wills 77; 1 Rep. on Leg. 119; Brookfield v. Allen, 6 Allen 585; Haraden v. Larrabee, 118 Mass. 431; Townsend v. Radcliffe, 44 Ill. 446; or with reference to the statute: Whitaker v. Whitaker, 6 Johns. 112; Stewart v. Stewart, 7 Johns. Ch. 229; Wright v. Trustees M. E. Ch., 1 Hoffm. Ch. 213; Lucas v. N. Y. C. R. R., 21 Barb. 245; Green v. Hudson R. R., 32 Barb. 25; Murdock v. Ward, 67 N.Y. 387, reversing 8 Hun 9; Luce v. Durham, 69

Id. 36; Keteltas v. Keteltas, 72 Id. 312; Hamlin v. Osgood, 1 Redf. 409; Slosson v. Lynch, 43 Barb. 147; Donnington v. Mitchell, 1 Gr. Ch. (N. J.) 247; Waters v. Tazewell, 9 Md. 291; Peterson v. Webb, 4 Ired. Eq. 56. But see, *contra*, Johnson v. Johnstone, 12 Rich. Eq. 260; In re Collins, 36 L. T. R. (N. S.) 437, son's wife was included in gift to next of kin of son according to the statute, there being also a gift to the next of kin of a daughter according to the statute, "exclusive of her husband." Whether next of kin shall take *per stirpes* or *per capita* depends, in the first place, upon the determination whether next of kin, as designated by the civil law or by statute, are intended. In the latter case the statute will determine the mode of division as well as the persons to take, Theobald on Wills 170; Wms. Ex'rs (6th Am. ed.) 1208, note k; see also 2 Story Eq. Jur., § 1065 d; Ranking's Settlement, 6 L. R., Eq. 601; Bullock v. Downes, 9 H. L. Cas. 1 (1860); and in Fielden v. Ashworth, 20 L. R., Eq. 410, a gift to "my relatives share and share alike as the law directs," was divided *per stirpes*; but see, *contra*, Houghton v. Kendall, 7 Allen 76 (*obiter*.) But a gift to the next of kin of two persons is divided *per stirpes*, Cooper v. Cannon, 1 Phill. Eq. 83; Jones v. Oliver, 3 Ired. Eq. 369; but not if there is one class, the next of kin of both persons, Rooke v. Att.-Gen., 31 Beav. 313 (1862.)

(u) Garrick v. Lord Camden, 14 Ves. 372, 385, 386.

(v) Exclusive of husband or wife, *vide post* § 6.

(x) Bullock v. Downes, 9 H. L. Cas. 1

express direction to divide in equal shares, (y) but not by a mere direction to take as tenants in common, without specifying the shares, (z) nor by the circumstance that the description excludes a person (viz. the widow) who would have taken a share in case of actual intestacy, the whole fund being divided among the others as if they alone had been entitled under the statute. (a) A gift to the "next of kin" of a married woman "as if she had died unmarried" has been held too doubtful a reference to the statute to let in any but the nearest relations. (b)

Under a bequest to the next of kin *ex parte materna*, a person who happens to be next of kin on the father's as well as on the mother's side will be entitled; (c) 18 unless the testator has expressly excluded the former. (d) Where a bequest was to the persons *exclusive of* A, who under the statute would, at the death of X, have been entitled to the testator's personal estate, *if he had died at that time intestate; A was in fact his sole next of kin at that time, and it was argued that this was a gift to a class "except" to the sole member of it, and therefore void; but it was held to be a valid bequest to the artificial class of persons who, if A were out of the way, would have been the testator's next of kin had he died immediately after X. (e) 19

Construction of gift to next of kin *ex parte paterna* or *materna*,

—to next of kin, exclusive of A.

It seems never to have been decided whether in case an additional term of description be annexed to a gift to next of kin, as if property be given to next of kin of a particular name, and the true next of kin do not bear that name, the nearest relations

Gift to next of kin of a particular name.

In re Ranking's Settlement, L. R., 6 Eq. 601; *contra*, In re Greenwood's Will, 3 Gif. 390, 31 L. J., Ch. 119, *sed qu.*

(y) Per Lord Langdale, 3 Beav. 132, and per Wood, V. C., Joh. 47. And see corresponding cases on gifts to "representatives," *post* § 6.

(z) Mattison v. Tanfield, 3 Beav. 131; Lewis v. Morris, 19 Beav. 34. *Contra* Richardson v. Richardson, 14 Sim. 526, and Godkin v. Murphy, 2 Y. & C. C. C. 351 ("persons entitled under the statute;") but both cases were plainly disapproved, 9 H. L. Cas. 28, 29, and the former was questioned by the judge who decided it, 8 Hare 307.

(a) Bullock v. Downes, *dub.* Lord Wensleydale, 9 H. L. Cas. 1, 22, 26.

(b) Halton v. Foster, L. R., 3 Ch. 505.

See also Lucas v. Brandreth, 28 Beav. 274; In re Webber, 17 Sim. 221, but *qu.* as to the *ratio decidendi*.

(c) Gundry v. Pinniger, 14 Beav. 94, 1 D., M. & G. 502.]

18. See, too, Hillhouse v. Chester, 3 Day 211.

[(d) See Say v. Creed, 5 Hare 580. A bequest to "next of kin in the male line in preference to the female line," does not exclude but only postpones the latter, *semb.* Boys v. Bradley, 10 Hare 399, 4 D., M. & G. 58, 5 H. L. Cas. 892, 900.

[(e) White v. Springett, L. R., 4 Ch. 300.]

19. Theobald on Wills 169; Wms. Ex'rs (6th Am. ed.) 1210; O'Hara on Int. of Wills 320; 2 Redf. on Wills 78.

who do bear it can take under the will. (f) The question was discussed, but a decision expressly avoided, in *Doe d. Wright v. Plumptre*. (g) ²⁰

In *Boys v. Bradley* (h) a testator, who died a bachelor, leaving several brothers and sisters his nearest relations, gave personal estate to be accumulated for the term of twenty-one years, and then to go to "his then nearest of kin in the male line in preference to the female line." At the end of the term the property was claimed by a sister, the sole survivor at that time of the nearest relations; by his nephews, the sons of sisters, claiming simply as male representatives of the family; and by a more remote male relation claiming wholly through males. It was held by Sir W. P. Wood, V. C., that the will was not void for uncertainty, but meant nearest relations *ex parte paterna*, and did not require the legatee to be a male or to claim wholly through males. The sister, therefore, answered all parts of the description. An appeal by the remote relation was dismissed first by the L. JJ. K. Bruce and Turner, and afterwards by D. P., it being considered clear that he was not the person designated. Lord Cranworth, C., gave more weight than Lord St. Leonards appears to have done to the mere fact that the appellant was not the nearest nor one of the nearest of kin. But he and the judges (who were consulted) agreed that it was much easier to say of any particular person that he was not the person designated, than to say who was. Sir J. K. Bruce, L. J., had *no doubt that the sister was related to the testator "in the male line," but was not satisfied that this expression, though used in contradistinction to "female line," was equivalent to the phrase "*ex parte paterna*;" since one might be allowed to speak of all his maternal kindred as his relatives in the female line, whether related to his mother on her father's side or otherwise; but it would be incorrect to speak of being related in the male line to all his father's relations. ²¹

[(f) See the corresponding cases on gifts to the heir, p. *65.

(g) 3 B. & Ald. 474 (deed.) The decision was that plaintiff's wife answered neither branch of the description. If "name" was to be literally understood (as to which, *post* § 7), she did not bear it at the prescribed time: if "name" meant "family," there was another of that family more nearly related. Shadwell,

V. C., is reported to have taken a different view of the decision, *Carpenter v. Bott*, 15 Sim. 609; but see S. C., 16 L. J., Ch. 433.]

²⁰ Theobald on Wills 171.

[(h) 10 Hare 389, 4 D., M. & G. 58, 5 H. L. Cas. 873, 25 L. J., Ch. 593 (*Sayers v. Bradley*.)

²¹ O'Hara on Int. of Wills 320; Wms. Ex'rs (6th Am. ed.) 1210; Theobald on Wills 170; 2 Redf. on Wills 78.

In *Williams v. Ashton*, (i) a testator devised *land* to her "nearest of kin by way of heirship," and the heir not being one of the nearest of kin, it was argued that he was not entitled; but Sir W. P. Wood, V. C., decided that he was, that the word heirship must be referred to the subject of gift, which was realty, and that the testatrix meant the nearest in the line through which real estate would descend; in short (though it was a circuitous way of expressing it) the heir. And, on the other hand, a gift of personalty to "the heirs or next of kin of A deceased" was held a bequest to the persons who would by law succeed to property of that description, viz., the statutory next of kin.] (k)

V.—The construction of the words "legal representatives," (l) or "personal representatives," has presented another perplexing and fruitful topic of controversy. Each of these terms, in its strict and literal acceptation, evidently means "executors," or "administrators," who are, properly speaking, the "personal representatives" of their deceased testator or intestate; but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, [in some cases,] that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee. Accordingly, in numerous cases, the term "legal representative," or "personal representative," has been construed as synonymous with *next of kin*, or rather as descriptive of the person or persons taking the personal estate under the statutes of distribution, who may be said, in a loose and popular sense, to "represent" the deceased. 22

[(i) 1 J. & H. 115.

(k) In *re Thompson's Trusts*, 9 Ch. D. 607, following *Lowndes v. Stone*, 4 Ves. 649, as explained by Lord Cottenham, 10 Cl. & Fin. 253.

(l) This term was thought by K. Bruce, V. C., less precise than "personal" or "legal personal representatives," *Topping v. Howard*, 4 De G. & S. 268; *Smith v. Barneby*, 2 Coll. 736. But see 2 Hare 523, 524; 2 Drew. 235; 4 De G. & J. 484.]

22. "It is settled that if an inference can be drawn from a will that a testator

used the words 'personal or legal personal representatives' to designate individuals answering the description though not in the strict legal sense of the terms, those persons will be entitled in preference to executors or administrators," 1 Rop. on Leg. 128, *et seq.*; see also *Hawkins on Wills* 108; *Wms. Ex'rs* (6th Am. ed.) 1217-1225; *Theobald on Wills* 175; *O'Hara on Int. of Wills* 305; 2 Redf. on Wills 79; *Flood on Wills* 556, n.; see also *Gryll's Trusts*, 6 L. R., Eq. 589 (1868); *Briggs v. Upton*, 7 L. R., Ch. App. 376 (1871), "to legal representatives

*Thus, in *Bridge v. Abbot*, (m) (which is a leading authority for this construction,) a testatrix made a bequest to certain persons, and, in case of the death of any of them before her (the testatrix,) to his or her *legal representatives*; and Sir R. P. Arden, M. R., held the next of kin to be entitled. This construction has been also adopted in several recent cases. As in *Cotton v. Cotton*, (n) where a testator bequeathed the residue of his property to his executors, to be divided between the gentlemen thereafter named, *or the legal representatives* of the said gentlemen, in the proportion that the sums set against their names bore to each other. The testator wrote the names of twelve persons, opposite to which he placed different

in a due course of administration;" *Robinson v. Evans*, 29 L. T. R. (N. S.) 715, 22 W. R. 199 (1874), "legal personal representatives;" while in *Alger v. Parrott*, 3 L. R., Eq. 328, a gift to A of the income of personal property for her life, the stock to be transferred at her death to her "personal representatives," was treated as a limitation giving her the absolute estate. In the following cases representatives have been construed next of kin: *Phyfe v. Phyfe*, 3 Bradf. 45; *Gibbons v. Fairlamb*, 26 Penna. St. 217; *Drake v. Pell*, 3 Edw. Ch. 251; *Brokaw v. Hudson*, 12 C. E. Gr. (N. J.) 135; *Thompson v. Young*, 25 Md. 450, in which case a legacy to the "legal representatives of A" went to his next of kin, and not to his executors, they taking *per capita* as being in equal degree. And in *Brent v. Washington*, 18 Gratt. 526, a gift to A's children "and their representatives according to the statute of distributions," went to the next of kin of a deceased child of A, and was taken by her husband; while in the similar case of *Watson v. Bonney*, 2 Sandf. 417, a remainder to "such persons as would be A's legal representatives by the statute of distributions," went to the next of kin, and not the husband. On the other hand, in *Ware v. Fisher*, 2 Yea. 578, the executor of A's wife surviving him, took a gift to A's "legal representatives;" so a remainder

by deed to "legal representatives," went to the executors, *Cox v. Curwen*, 118 Mass. 198. And so in *Chapman v. Chapman*, 33 Beav. 556 (1864), a gift to brothers and sisters "or their representatives in equal shares," went to the executors; so a gift to testator's sons for life, and to their children, if they should leave any, and if not, to their "legal representatives," in *re Turner*, 2 Sm. & Gif. 501 (1865); so where a remainder was limited in a marriage settlement, after life estates to husband and wife, to their "personal representatives," *Best's Settlement*, 18 L. R., Eq. 686 (1874), *Hall, V. C.*, distinguishing this case from *Robinson v. Evans* and *Briggs v. Upton*, above cited; so where the gift was to children for life, and to the survivor, with remainder over to be divided among the "legal representatives" of all, *Wing v. Wing*, 34 L. T. R. (N. S.) 941, 24 W. R. 878 (1876); the case of *King v. Cleaveland*, 26 Beav. 26, being distinguished by its provisions ("equally, share and share alike.")

(m) 3 B. C. C. 224. See also *Long v. Blackall*, 3 Ves. 486; [*Hewitson v. Todhunter*, 22 L. J., Ch. 76, where, however, the universal legatee, not the next of kin, of the original legatee, was held entitled, *sed qu.* If next of kin take, they take *per stirpes*, *Rowland v. Gorsuch*, 2 Cox 187; *Booth v. Vicars*, 1 Coll. 6.]

(n) 2 Beav. 67.

figures. One of these persons was dead at the date of the will, having left a will. Lord Langdale, M. R., held that the next of kin of the deceased person named by the testator, not the residuary legatee, were entitled.

[In these two cases the gift to the persons named was immediate ; a circumstance which will be observed upon in the sequel.

Again,] in *Baines v. Ottey*, (o) where a testator gave certain real and personal estate to trustees, in trust for such persons as A (a married woman) should appoint, and in default of appointment, for her separate use, and, at her decease, to convey the real estate to such person or persons as would be the heir-at-law of the said A, and to assign the personal estate to or amongst such person or persons as would be the personal representatives of the said A ; Sir J. Leach, M. R., held the next of kin to be entitled.

[And in *Smith v. Palmer*, (p) where a testator, after the death of his wife, gave his property to A, "if he should be then living, but if he should be then dead, to his legal representative or representatives, if more than one, *share and share alike*;" Sir J Wigram, V. C., held these words to mean next of kin according to the statute of distribution.

So, in *Atherton v. Crowther*, (q) where there was a residuary bequest to the testator's wife for life, remainder to the children of A living at A's death, "but if any of the said children should die in A's lifetime, then for the personal representatives of such *child or children to take *per stirpes* and not *per capita* ; and in another clause there was a gift "in case there should be no such children nor any representatives of such children living at A's death, then to the persons who should be the testator's next of kin;" it was held by Sir J. Romilly, M. R., that the words personal representatives meant descendants. (r) 23

(o) 1 My. & K. 465, 2 Coll. 733, n.

(p) 7 Hare 225 ; see also *Wilson v. Pilkington*, 11 Jur. 537 ; *King v. Cleaveland*, 26 Beav. 26, 4 De G. & Jo. 477 ; *Holloway v. Radcliffe*, 23 Beav. 163.

(q) 19 Beav. 448.

[(r) The sense of next of kin was held to be excluded by the context, because the provision that the legatees should take *per stirpes* was less applicable to next of kin than to descendants, and in the subsequent clause the words "personal

"Personal" or "legal representatives" held to mean next of kin.

"Personal representatives" held to mean descendants.

23. 1 Rop. on Leg. 133 ; Theobald on Wills 176. Devise "to A and B or their legal representatives," construed to mean children taking by substitution, *Abbott v.*

Jenkins, 10 Serg. & R. 296 ; *Stook's Appeal*, 20 Penna. St. 349. the representatives taking *per stirpes* in both cases.

Again, in *Jennings v. Gallimore*, (s) where, by deed, a fund was vested in trustees, in trust to pay it to such persons as A should by deed or will appoint, and, in default of appointment, then to "the legal representatives of A, according to the course of administration." A by his will appointed the fund "to be paid by the said trustees unto my legal representatives according to the course of administration," and gave all the rest of his property to B, and appointed B and C executors; it was held by Sir R. P. Arden, M. R., that the next of kin of A were entitled under the appointment. "The testator (he said) would never have made such a will if he had thought all the words he had used came to nothing more than executing the power by giving the fund to B"—i. e., by giving it to the executors for them to administer by paying it, as in due course they would have been bound to do, to B.

In the four last cases the direction as to the mode in which the trust fund was to be paid, shared, or enjoyed, was held to be sufficient evidence that the testator did not use the words "personal representatives" in their strict sense.]

And as a testator is supposed to have a different meaning whenever he uses a different expression, it is always a circumstance favorable to the construction which reads the words "legal" or "personal representatives" as denoting *next of kin*, that there is elsewhere in the same will, and in reference to another subject of disposition, a gift to the executors or administrators of the same individual.

Thus, in *Walter v. Makin*, (t) where a testator gave £450 to trustees, in trust for his son for life, and, after his son's decease, to pay thereout

representatives" and "next of kin" were contrasted, where the former could not be held to mean executors or administrators without leading to the absurdity that that gift was to depend on whether administration was taken out in the lifetime of A. It may be added that the children being legitimate could scarcely die "without any representatives" in the sense of next of kin.] See also *Styth v. Monro*, 6 Sim. 49. [In *Horsepool v. Watson*, 3 Ves. 383, "representatives" was construed "issue." In *re Booth's Estates*, W. N. 1877, p. 129, "legal representatives of children," who were to take "their pa-

rents' shares," was construed "grandchildren."]

[(s) 3 Ves. 146. See also *Briggs v. Upton*, L. R., 7 Ch. 376; In *re Gryll's Trusts*, L. R., 6 Eq. 589, where, however, a trust by will for a married daughter's relations as she should appoint, and in default for "the persons who would be her personal representatives in case she had died unmarried," was referred to by codicil as a trust for the daughter's "relations and next of kin." Moreover, her executor or administrator was not before the court.]

(t) 6 Sim. 148. [The opposite inference

two legacies of £100 each to two of his daughters, and to pay the residue to the *legal representatives* of his son; and he gave the residue of his personal estate to his son, his *executors, administrators and assigns*; Sir L. Shadwell, V. C., held, that the words "legal representatives" meant next of kin.

So, in *Robinson v. Smith*, (u) where the bequest was to M., his executors, &c., in trust to pay the interest to the testator's daughter, S., wife of M., for her separate use for life, and after her decease to pay the trust moneys to such persons as S. by will should appoint, and, in default, to her *personal representatives*. S. died in her husband's lifetime, without having made any appointment, and her husband claimed the fund as her administrator; but Sir L. Shadwell, V. C., decided that the next of kin of the wife were beneficially entitled: [the husband was the trustee, and was to pay the fund.

"Personal representatives" construed next of kin.

And a still stronger argument for the same construction is derived from the word "next" being prefixed to "legal representatives," that being a word which has no connection with the character of executor or administrator.] (x)

Effect of the word "next" prefixed to "legal representatives."

Indeed, so strong has been the leaning sometimes in favor of the construction which gives to words pointing at succession or representation the sense of next of kin, that even a gift to *executors* or *administrators* has been thus construed.

"Executors or administrators" held to mean next of kin.

As in *Palin v. Hills*, (y) where a testator, after bequeathing certain pecuniary legacies, declared that, in case of the death of any or either of the legatees, his or her legacy should go to *his or her executors or administrators*; Sir J. Leach, M. R., held that the residuary legatee of one of the legatees, who died in the testator's lifetime, was entitled to the legacy; but his decree was reversed by Lord *Brougham, C., who decided in favor of the next of kin, on the authority of *Bridge*

Palin v. Hills.

is obviously deducible from the circumstance of "personal representatives" being elsewhere used in the sense of "executors," *Dixon v. Dixon*, 24 Beav. 129.]

(u) 6 Sim. 47. [See also *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Marquis of Camden*, 16 Sim. 329; *Booth v. Vicars*, 1 Coll. 10, 11; per Wickens, V. C., L. R., 7 Ch. 378, n. But see *Saberton v. Skeels*, 1 R. & My. 587; *Hinchliffe v. Westwood*, 2 De G. & S. 216; and per Kindersley,

V. C., in re Crawford, 2 Drew. 240. In *Phillips v. Evans*, 4 De G. & S. 188, "personal representatives" were interpreted by the words "or next of kin" subjoined. See also *Baker v. Gibson*, 12 Beav. 101.

(x) *Booth v. Vicars*, 1 Coll. 6; *Stockdale v. Nicholson*, L. R., 4 Eq. 359.]

(y) 1 My. & K. 470; [and see *Bulmer v. Jay*, 4 Sim. 48, 3 My. & K. 197.] But see *Wallis v. Taylor*, 8 Sim. 241, stated post 119.

v. Abbot, (z) thinking that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives.

From cases of this description, however, we must carefully distinguish those in which the words "executors and administrators," or "legal representatives," are used as mere words of limitation. As in the common case of a gift to A and his executors or administrators, or to A and his legal representatives, which will, beyond all question, vest the absolute interest in A. (a)

The same construction, too, in some instances, has been applied in cases of a more doubtful complexion; as where the bequest was to A for life, and, after his decease, to his executors or administrators (b) or personal representatives. (c) [So, in numerous instances, where a testator has given a fund in trust for A for life (frequently a married woman,) with power to appoint it after her death, and, in default of appointment, to the "executors and administrators," or to the "personal representatives" of A, the words have received this their proper interpretation. A was considered to be the only object of bounty, and the words were held to be in effect mere words of limitation. (d) And a trust for children which fails, (e) or a clause of forfeiture on alienation or bankruptcy which is not called into action, (f) interposed between the life estate and the ultimate trust, will not affect the construction.]

And it should seem that where the word "assigns" is subjoined to "executors and administrators," they are always read as words of limitation, and not as designating next of kin. Thus, in *Graffley v. Humpage*, (g) where a sum of £4000

Limitation to executors, administrators, and assigns.

(z) *Ante* 112.

(a) *Lugar v. Harman*, 1 Cox 250; [*Taylor v. Beverley*, 1 Coll. 108; *Appleton v. Rowley*, L. R., 8 Eq. 139.]

(b) Co. Lit. 54 b; *Socket v. Wray*, 4 B. C. C. 483. [See other cases, *post* chap. XXXVI. *Nurse v. Oldmeadow*, 5 L. J., Ch., 300, *cor.* *Shadwell*, V. C., is *contra*, unless distinguishable on the ground that the limitation was to the executor, in the singular. *Sed qu.*]

(c) *Alger v. Parrott*, L. R., 3 Eq. 329.

[(d) *Saberton v. Skeels*, 1 R. & My. 587. *Att.-Gen. v. Malkin*, 2 Phill. 64; *Devall v. Dickens*, 9 Jur. 550; *Page v.*

Soper, 11 Hare 321 (settlement.) If A becomes bankrupt the trustee is entitled to the fund as part of A's estate, *In re Seymour's Trusts*, Joh. 472; and see *Webb v. Sadler*, L. R., 8 Ch. 419; *Mackenzie v. Mackenzie*, 3 Mac. & G. 559 (appointment of policy on appointor's life to his own executors.)

(e) *Allen v. Thorp*, 7 Beav. 72 (settlement); *In re Wyndham's Trusts*, L. R., 1 Eq. 290; *In re Best's Trusts*, L. R., 18 Eq. 686 (settlement.)

(f) *Webb v. Sadler*, L. R., 8 Ch. 419.]

(g) 1 Beav. 46. See also *Hames v. Hames*, 2 Kee. 646; [*Howell v. Gayler*,

was bequeathed *by A to trustees, in trust for his wife and daughter and the survivor for life, for their separate use, and after the decease of the survivor, in trust for the daughter's children, if any, and if none, then the testator gave one moiety of the £4000 to his brother I., and the other moiety to such persons as the daughter should by deed or will appoint, and in default, to the *executors, administrators, or assigns* of the daughter. The daughter died in the lifetime of her husband, childless, and without having made any appointment: and the husband was, on the ground above mentioned, held to be entitled as her administrator.

[But the strict or literal construction of the words *executors or representatives* is not confined to cases where they are thus in form mere words of limitation. It will also generally obtain where there is a prior gift to A, and the gift to his executors or representatives is in the form of a substitution for him in case of his death. Thus,] in *Price v. Strange*, (*h*) a testator devised real estate to his wife during widowhood, and at her death or marriage to trustees upon trust for sale, and directed that, in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or, being a daughter, should have attained that age, or be married with consent, his trustees should, immediately after the receipt of the money arising from the said real estates, pay and divide the same among such of his children as should be then living, *and the legal representative or representatives of him, her or them, as should be then dead*; and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should, at that time, be entitled to receive their shares, in case he, she, or they had been then living, *and if dead, then to his, her, or their legal representatives*: Sir J. Leach, V. C., [held, that legal representatives must be understood in their ordinary sense of "*executors or administrators*," and that this made it equivalent to a direction to pay at the death of

5 Beav. 157; *Halloway v. Clarkson*, 2 French, 4 Ves. 418; *Hinchliffe v. West-Hare*, 521; *Spence v. Handford*, 27 L. J., Ch. 767, 4 Jur. (N. S.) 987; cf. *In re Newton's Trusts*, L. R., 4 Eq. 171, stated ante p. *79.

(*h*) 6 Madd. 159. See also *Corbyn v. re Turner*, 2 Dr. & Sm. 501.

the widow to the children, their executors or administrators; or, in other words, gave a vested interest to the children.

It will be observed, that in this case, and in the others cited with it, the gift to the legatees or their representatives was to *take effect after a previous life estate, *i. e.*, the event contemplated was the legatee surviving the testator, but dying before the tenant for life. (i) A distinction was drawn by Sir R. Kindersley, V. C., (j) between such a case and that of an immediate gift to A or his representatives without a previous life estate. In the former case, he thought there was no improbability in supposing the testator to have intended that the legacy should go to the legatee's executors or administrators as part of his personal estate; for then the legatee got the benefit of the bequest as a reversionary legacy, though he might not live to receive it. But, in the latter case, the testator was providing for the event of the intended legatee dying in his (the testator's) lifetime. In such event the intended legatee could not under any construction which could be put on the words "legal representatives" derive any advantage from the bequest; indeed, he would never even know of it. The V. C. thought it highly improbable that the testator should intend the legacy to go to the executors or administrators as part of the legatee's general assets, perhaps to benefit no one but the legatee's creditors. He therefore held that in such a case the term "representatives" was properly construed next of kin, and that *Bridge v. Abbot* (k) and *Cotton v. Cotton* (l) were thus consistent with the other authorities.

But, although the gift is immediate, the context may, of course, show that the words have been used in their proper sense. Thus, in *Long v. Watkinson*, (m) where a testator bequeathed the residue of his estate to A, but in case of her death then "to the executors or executrixes whom A may appoint;" A died in the testator's lifetime, and Sir J. Romilly, M. R., said he could not reconcile *Palin v. Hills* with the later authorities, and decided that neither the residuary legatee nor the next of kin of A took the residue as *personæ designatæ*, but that it went to her executrix as part of her personal estate. Besides that "executors" is a less ambiguous term than "personal representa-

Distinction in regard to substitution between immediate and future gift.

(i) If, in such case, the legatee died in the testator's lifetime, the legacy would lapse, *Corbyn v. French*, 4 Ves. 418. See *post* ch. XLIX.

(j) In re Crawford, 2 Drew. 242.

(k) 3 B. C. C. 224, *ante* *112.

(l) 2 Beav. 67, *ante* *112.

(m) 17 Beav. 471.

tives," (n) it may be noted that the words "whom A may appoint" were very inappropriate to describe her next of kin; for of course A could not appoint who they should be.

Again, a gift to such a class as shall be living at a time *stated, and "the executors or administrators of such of them as shall be then dead, will, *prima facie*, go to the legal personal representatives, and not to the next of kin. (o) This, perhaps, might be considered to be *quasi* substitutional.

Gift to "executors" or representatives" of A, *simpliciter*, strictly construed.

But a gift to the "executors" or "representatives" of A, *simpliciter*, without any previous gift or suggestion of gift to A, and whether A is dead at the date of the will, (p) or whether (as it should seem) he survives the testator, (q) will generally receive the same construction.]

Supposing the words "executors" or "administrators" not to be used as words of limitation, [nor as descriptive of next of kin,] the question arises (which has been in some measure anticipated), whether the property so given vests in the persons answering such description for their own benefit, or is to be administered as part of the personal estate of the testator or intestate?

Whether executors or administrators are entitled for their own benefit.

The former result, indeed, is so manifestly contrary to probable intention, that the case of *Evans v. Charles*, (r) in which this construction prevailed, has been generally condemned; and the judge, whose solitary approbation the decision has elicited, did not choose to follow its authority; (s) and such a construction would be the more palpably absurd, now that, by express enactment, (t) executors are excluded from taking beneficially, by virtue of their office, even the undisposed-of personal estate of their testator. Accordingly, it [is] established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person vests in them as part of the personal estate of the testator or intestate.

(n) See per Lord Cottenham, *Daniel v. Dudley*, 1 Phill. 6; and per Sir J. Romilly, *M. R., Atherton v. Crowther*, 19 Beav. 450, 451.

(o) In re *Seymour's Trusts*, Joh. 472.

(p) *Trethewy v. Helyar*, 4 Ch. D. 53; *Leak v. Macdowall*, 33 Beav. 238, where the declared motive for the bequest was that A and B (partners in trade) had lost a like amount by the testator, and it was held not a bequest to the firm so as to pass

to the successors in business. As to this, see *Kerrison v. Reddington*, 11 Ir. Eq. Rep. 451.

(q) *Morris v. Howes*, 4 Hare 599 (limitation in a settlement to the executors, administrators and assigns of A.)]

(r) 1 Anstr. 128. See also *Churchill v. Dibben*, Sugd. Pow. (8th ed.) 313.

(s) See *Long v. Blackall*, 3 Ves. 483.

(t) 1 Wm. IV., c. 40.

Thus, where (*u*) a testator bequeathed £500 to B after the death of A, and if B died in A's lifetime, then to such persons as B should by will appoint, and, in default of appointment, to *his executors or administrators*; Lord Langdale, M. R., held that the executor of B was bound to apply the legacy according to the purposes of the will. It is singular that no claim was advanced by the next of kin, on the authority of the case of *Palin v. Hills*.

[*And, notwithstanding the case last mentioned, the same rule prevails though the original gift is immediate, and the legatee dies in the testator's lifetime, (*x*) or is dead at the date of the will. (*y*)

It has also been held applicable to the case of real estate, the gift in that case being held equivalent to a declaration that the estate shall be held by the executors as part of the personal estate of the person named. (*z*)

On the same principle property given to the executors or administrators (*a*)²⁴ or to the personal representative (*b*) of the testator himself forms part of his general personal estate in the hands of his legal personal representatives; Sir J.

—in case of
real estate.

Construction
of gift to the
executors of A
without prior
gift to A.

(*u*) *Stocks v. Dodsley*, 1 Kee. 325; [see also *Collier v. Squire*, 3 Russ. 467; *Morris v. Howes*, 4 Hare 599 (deeds.)

(*x*) *Long v. Watkinson*, 17 Beav. 471, ante p. *117.

(*y*) *Leak v. Macdowall*, 33 Beav. 238; *Trethewy v. Helyar*, 4 Ch. D. 53.

(*z*) *Per Romilly, M. R., Dixon v. Dixon*, 24 Beav. 135; *Wellman v. Bowring*, 2 Russ. 374, 3 Sim. 328.

(*a*) *Andrew v. Andrew*, 1 Coll. 686. And see *Mackenzie v. Mackenzie*, 3 Mac. & G. 559.]

24. See *Theobald on Wills* 179, 180; *Hawkins on Wills* 312; 1 *Rop. on Leg.* 134; *Wms. Ex'rs* (6th Am. ed.) 1226, *et seq.*; 2 *Redf. on Wills* 85. In *Grasser v. Eckart*, 1 Binn. 584, an undisposed-of residue goes to the executors beneficially, if no other intention appears in the will; such intention, however, was presumed in the case in question from directions in the will that the executors make a public sale to the best advantage; and in *Bull v.*

Bull, 8 Conn. 49, a residuary bequest to executors to dispose of "among our brothers and sisters as they shall judge to be most in need," vested in them as trustees only. And in the following English cases (all since the statute of Wm. IV.) the executors have taken as trustees, and not for their own benefit: *Read v. Stedman*, 26 Beav. 495 (1859), a residue given to executors to pay legacies and debts, of which a surplus remained in their hands; *Dacre v. Patrickson*, 1 Dr. & Sm. 182 (1860), the bequest having been given in trust for a charity, which failed; *Saltmarsh v. Barrett*, 3 De G., F. & J. 279 (1861), where there were special legacies to the executors, and a devise to them of the whole estate, subject to charges which did not exhaust it; *Barrs v. Fewkes*, 12 W. R. 666 (1864), devise to executor "to enable him to carry into effect the purposes of the will;" *Buckle v. Bristow*, 13 W. R., 68 (1864), where unequal legacies were given to the executors "irrespective

[(*b*) *Smith v. Barneby*, 2 Coll. 728.

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K. Bruce, V. C., holding that it was not enough to exclude the rule that by declaring them to be trustees the bequest to them was mere surplusage. (c)]

If, however, the testator explicitly declares that the executors or administrators shall be entitled for their own benefit, this construction must prevail against any suggestion as to the improbability of such a mode of disposition.

Gifts to executors "for their own use."

As, in *Wallis v. Taylor*, (d) where a testatrix bequeathed a fund to

of any interest they may ultimately take in the residue," and the residue was given them in trust for charities which failed; *Bird v. Harris*, 9 L. R., Eq. 204 (1869), where the estate was given to the executors "in and for the consideration of their paying" the rents and profits to testator's widow, for her life; *Chester v. Chester*, 12 L. R., Eq. 444 (1871), where equal legacies were given to executors and the residue, they taking the latter in trust; *Travers v. Travers*, 14 L. R., Eq. 275 (1872), where the executors were directed to pay all debts and expenses so as not to charge the "residuary legatee" and no disposition was made of the residue; *Tretheway v. Helyar*, 4 L. R., Ch. Div. 53 (1872); *Wright v. Revell*, 27 L. T. R. (N. S.) 439 (1872), where there was a legacy and residuary gift to executor "for paying off" a debt due him from the testator, and a surplus remained in his hands; *Neo v. Neo*, 6 L. R., P. C. 381 (1875), where the residue was given to executors in trusts, which were held void; *Bottle v. Knocker*, 46 L. J., Ch. Div. 159 (1877), where a house built for the executrix by the testator, upon ground held by him under an incomplete agreement for a lease was held not to pass beneficially under a general bequest. In the following English cases, on the other hand, and notwithstanding the statute, the executor was allowed to take for his own benefit: *Clarke v. Hilton*, 2 L. R., Eq. 815, where a gift of personal property was given to testator's grandson and three others who were executors, subject to debts, legacies and trusts which

did not exhaust it; In re *Henshaw*, 12 W. R. 1139, 34 L. J., Ch. 98 (1864), where a legacy was given to executors on condition of their acting as such, other legacies and debts were charged on the property and the residue given to the executors, and by a codicil a particular house devised to them in trust to divide proceeds among testator's children, they took the residue beneficially; *Romans v. Mitchell*, 15 W. R. 552 (1867), where, after various legacies to his executors in trust, testator gives the residue to his "two friends A and B" (the executors) "share and share alike as tenants in common to hold to their heirs and assigns forever;" *Jewis v. Lawrence*, 8 L. R., Eq. 345 (1869), unequal legacies to executors, describing each as "one of my trustees and executors"—one of them died before probate, but the inequality of the gifts was held to rebut the presumption of their being given on condition of acting as executor, and his representatives were allowed to take; *Williams v. Arkle*, 7 L. R., H. L. 646 (1875), where testator appointed A his executor—and if he should not survive him, then B—and gave each a legacy of £1000—and after provision for his wife and family, gave the residue to A if he survived, and if not, to B, A was held entitled to take for his own benefit.

(c) See *Hinchliffe v. Westwood*, 2 De G. & S. 216.]

(d) 8 Sim. 241. [See also *Sanders v. Franks*, 2 Mad. 147. But see as to marriage settlements, *Hames v. Hames*, 2 Kee. 646; *Marshall v. Collett*, 1 Y. & C. 232;

trustees in trust to pay the interest for the separate use of her daughter for life, and, after her decease, upon trust to transfer the principal to her executors or administrators, *to and for his, her or their use and benefit absolutely forever*; Sir L. Shadwell, V. C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit.

In this case, the point of contention was not so much whether the administrator was entitled in his own right beneficially, or in his representative character (this being, in regard to a husband-administrator, a matter of no importance, unless there are creditors, as he retains the property for his own benefit,) but *whether, according to the case of *Palin v. Hills*, the bequest was not to be construed as applying to the next of kin. The testator's intimation, that the legatees should take for their own benefit, was not only consistent with, but perhaps, was rather favorable to this construction, as tending to show that the testator had in his view persons who might reasonably be presumed to be intended as beneficial objects of gift.

[The conclusion is that under a gift simply to "representatives," "legal representatives," "personal representatives," and to "executors and administrators," the hand to receive the property is that of the person constituted representative by the proper court, and that it lies on those maintaining a different construction to show that the testator's intention is clearly so; but that the person so constituted will in the absence of a clear intention to the contrary take the property as part of the estate of the person whose representative he is, and not beneficially.] (e)

VI.—The word *relations* taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the statutes of distribution; and it has

Meryon v. Collett, 8 Beav. 386; *Johnson v. Routh*, 27 L. J., Ch. 305. In *Smith v. Dudley*, 9 Sim. 125, an ultimate limitation in a settlement of the wife's property to "the executors and administrators of her own family" was held to carry it to her next of kin as *personæ designatæ*, although

the ultimate limitation of the husband's property to the executors and administrators of his own family was held to give the husband the absolute interest.

(e) Per Wigram, V. C., *Holloway v. Clarkson*, 2 Hare 523.]

been long settled, that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin. (f) 25

It was formerly doubted whether this construction extended to devises comprising real estate [only,] but the affirmative was decided in *Doe d. Thwaites v. Over*, (g) where a testator devised all his freehold estates to his wife for life, and, at her decease, to be equally divided among the relations on his side; and it was held, that the three first cousins of the testator, who were his next of kin at his death, were entitled. A counter claim was made by the heir-at-law, who was the child of a deceased first cousin, and who contended that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal *relation, also claimed the whole, as being designated by the words "on my side;" but the court was of opinion that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations *ex parte paterna*.

Objects of a gift to relations determined by statutes of distribution.

The rule which makes the statutes of distribution the guide in these cases is not departed from on slight grounds. Thus, the exception out of a bequest to relations, of a nephew of the testator (who was the son of a living sister,) was not considered a valid ground for holding the gift to include other persons in the same degree of relationship, and

(f) 2 Ch. Rep. 77; Pre. Ch. 401; Gilb. Eq. Cas. 92; 1 Atk. 469; Cas. temp. Talb. 251; 2 Eq. Ab. 368, pl. 13; Dick. 50, 380; Amb. 70; 1 T. R. 435, u., 437, n.; 1 B. C. C. 31; 3 Id. 234; 4 Id. 207; 8 Ves. 38; 9 Id. 319; 16 Id. 27; 19 Id. 423; 3 Mer. 437, 689; [overruling *Jones v. Beale*, 2 Vern. 381. So "friends and relations," 2 Ves. 87, 110; 2 Dr. & Sm. 527.] But as to powers of selection in favor of relations, *vide ante* p. *95, u. (s).

25. Wms. Ex'rs (6th Am. ed.) 1205; Hawkins on Wills 102; 1 Rop. on Leg. 100; Theobald on Wills 157; O'Hara on Int. of Wills 320; 2 Redf. on Wills 85; Flood on Wills 708; Lees v. Massey, 3 De G., F. & J. 113 (1861); Fielden v. Ashworth, 20 L. R., Eq. 410 (1875). Peters' Estate, 32 Leg. Int. (Pa.) 218; McNeillledge v. Galbraith, 8 Serg. & R. 43;

McNeillledge v. Barclay, 11 Serg. & R. 103; Drew v. Wakefield, 54 Me. 291; Vanell v. Wendell, 20 N. H. 431; Hoey v. Kenny, 25 Barb. 396, a legacy to testator's widow for life, then to be divided among testator's "relations" as she may appoint by will, upon her dying intestate goes to all who are capable of inheriting by the statute at the wife's death, and a power to the wife to appoint among "her relatives and friends" extends only to her next of kin, Caplin's Will, 2 Sm. & Giff. 527 (1865). But "relations" does not include a *step-son*, Kimball v. Story, 108 Mass. 382; nor will it include an illegitimate niece, though called his niece by testator in another part of his will, Hibbert v. Hibbert, 15 L. R., Eq. 372 (1873.)

(g) 1 Taunt. 263.

thereby let in the children of a living sister, to claim concurrently with their parent and other surviving brothers and sisters, and the children of a deceased brother, of the testator. (*h*)

[On the other hand, in *Greenwood v. Greenwood*, (*i*) where a testatrix gave the residue "to be divided between her relations, that is, the Greenwoods, the Everits, and the Dows:" the testatrix had herself explained her meaning, and, therefore, the Everits, although not within the degree of relationship limited by the statute, were held to take jointly with the Greenwoods and Dows, who were.]

There is, it seems, no difference in effect between a gift to relations in the plural, and *relation* in the singular; the former To "relation" in the singular. would apply to a single individual, and the latter to any larger number; the term *relation* being regarded as *nomen collectivum*. And this construction obtained in one case (*k*) where the expression was "my nearest relation of the name of the Pyots."

[In a gift to next of kin expressly according to the statutes of distribution, the statutes, as already noticed, not only determine the objects of gift, but also regulate the manner and proportions in which they take. (*l*) 26 And a gift to Distribution among "heirs," or "representatives" is under the statute. "heirs" (*m*) or "legal representatives," (*n*) where either expression is construed statutory next of kin, is brought by the implied reference to the statute under the same rule.

*A gift to "relations," though not so plainly pointing to succession But among "relations" is per capita. *ab intestato*, might perhaps have been thought to fall within the reason of the rule. (*p*) By construction such a

(*h*) *Rayner v. Mowbray*, 3 B. C. C. 234.

[(*i*) 1 B. C. C. 32, n. See *Stamp v. Cooke*, 1 Cox 234, stated *post*; *Griffith v. Jones*, 2 Freem. 96.]

(*k*) *Pyot v. Pyot*, 1 Ves. 337; [and see per Lord Loughborough, *Marsh v. Marsh*, 1 B. C. C. 294. So of the words "inheritor," "party," &c., *Boys v. Bradley*, 10 Hare 389, 4 D., M. & G. 58.

(*l*) *Ante* p. *109.]

26. Wms. Ex'rs (6th Am. ed.) 1205, note q; *Hawkins on Wills* 105; 1 *Rop. on Leg.* 101; *Theobald on Wills* 158; 2 *Redf. on Wills* 86; *McNeilledge v. Galbraith*, 8 Serg. & R. (Pa.) 43; *McNeilledge v. Barclay*, 11 Serg. & R. (Pa.) 103. But a gift to be divided between testator's

"relations" and his wife's is divided *per stirpes*, *Young's Appeal*, 83 Penna. St. 59.

[(*m*) *Jacobs v. Jacobs*, 16 Beav. 557. And see *Dood v. Higgins*, 2 K. & J. 729; *In re Porter's Trusts*, 4 K. & J. 188; *In re Thompson's Trusts*, 9 Ch. D. 607.

(*n*) See *Booth v. Vicars*, 1 Coll. 6; *Rowland v. Gorsuch*, 2 Cox 187, *ante* p. 100; *Alker v. Barton*, 12 L. J., Ch. 16. *Walker v. Marquis of Camden*, 16 Sim. 329, is *contra*, *sed qu.*; and in *Stockdale v. Nicholson*, L. R., 4 Eq. 359, a gift to "next personal representatives" was treated as a gift to "next of kin," (*totidem verbis*), and as creating a joint tenancy; *sed qu.*, see *Booth v. Vicars*, *sup.*

(*p*) See the author's note to 1 *Pow.*

gift is limited to those entitled as next of kin under the statute; (*q*) and though this is founded on the inconvenience of a wider interpretation, (*r*) still it is a rule of construction, and as such supposes the testator to have the statute in his contemplation. But authority, though not perfectly distinct, inclines to an opposite view. *Tiffin v. Longman*. Thus in *Tiffin v. Longman*, (*s*) where a testator gave personality to his daughter for life, and if she died without issue (which happened) he directed that advertisements should be published for the information of his relations, and gave the property to such of them as should make their claim within two months after such advertisements, to be divided among them according to the discretion of his executors (who died without exercising it); it was held by Sir J. Romilly, M. R., that the class was to be ascertained at the death of the daughter, that it consisted of those who would have been the testator's statutory next of kin if he had then died intestate, and that the property must be divided between the class equally, *per capita*.

From the express direction to divide *per capita* it is to be inferred that the facts of the case (which in this respect are not given) actually called for a decision of the material question whether distribution should or should not be according to the statute, *i. e. per stirpes*. It is observable, however, that the objects of gift were what has been called an artificial class created by the testator and to be ascertained at a time other than the death of the *propositus*—a circumstance which, even where the gift is to “next of kin” with an express reference to the statute, is considered to deprive the reference of much of its force beyond ascertaining the persons who are to take. (*t*)

Again in *Eagles v. Le Breton*, (*u*) where a testatrix gave all her property to her sisters A and B, and by codicil directed that at their death it should “pass to her relations in America.” Her *relations in America at her death consisted of thir-

Eagles v. Le Breton.

Dev. 290, maintaining this view, chiefly on the authority of *Pope v. Whitcombe*, 3 Mer. 689: it afterwards appeared that the report of that case was inaccurate, and that the facts of it did not raise the question, Sug. Pow. (8th ed.) 660. However, the author re-stated his former view, though without reference to any authority, 1st ed. of this work, Vol. II., p. 46. And see per Kindersley, V. C., 2 Sim. (N. S.) 111, 112.

(*q*) Gilb. Eq. Cas. 92.

(*r*) 1 B. C. C. 33.

(*s*) 15 Beav. 275.

(*t*) See per Selwyn, L. J., L. R., 4 Ch. 303; per Lord Cairns, 4 App. Cas. 451.

(*u*) 42 L. J., Ch. 362; also reported, but less fully and with some variations, L. R., 15 Eq. 148 (where “tenant for life” in the judgment is an *erratum* for “testatrix.”)

teen persons, all being her first cousins. One of them died before B, (who survived the testatrix.) It was held by the same judge that the thirteen cousins were entitled, and that they took, not as tenants in common, as they would have taken under the statute, but as joint tenants. He said it was settled that under a gift of this description the class was to be ascertained at the testator's death; (x) also that "relations" meant the persons who would take under the statute; that it was true that where there was an express reference to the statute they would take as tenants in common in the shares in which they would have taken on an intestacy. But that when there was no express reference to the statute the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance all the members of the class took as joint tenants.

Here again the class was an artificial one, being limited to those in America, and excluding the surviving sister. (y) This limit happened to be the same as (putting the sister aside) was imposed by the statute. But the statute was not thereby prevented from applying; for the circumstances might have been different at the death of the testatrix, and a gift to relations in a particular country might often be as indefinite as a gift to relations *simpliciter*. In denying to any but an express reference to the statute the effect of importing the statutory mode of distribution, the M. R. probably intended to speak only of a case where (as here) the term used was "relations," and not to deny the sufficiency of an implied reference in cases where the terms used were "next of kin" or "heirs," which would have been to contradict a previously expressed opinion (z) and a previous decision (a) of his own.]

A. fortiori
where there are
words directing
equal distribu-
tion.

If the testator has introduced into the gift expressions pointing at equality of participation, of course the statutory mode of distribution is excluded, and all the objects of every degree are entitled in equal shares, (b) whether the gift be to "relations" [or (where either of these terms is construed statutory next

(x) As to this see below.

(y) The cousins not being properly next of kin, would they have been entitled if the gift had been to "next of kin in America?" See *Doe v. Plumptre*, ante p. *110. In *Smith v. Campbell*, 19 Ves. 400, upon a gift to "nearest relations in Ireland," Grant, M. R., held the words "in Ireland" to be *demonstratio* merely, not

limitatio.

(z) In *Lucas v. Brandreth*, 28 Beav. 278.

(a) *Jacobs v. Jacobs*, 16 Beav. 557, ante p. *121.]

(b) *Thomas v. Hole*, Cas. temp. Talb. 251; *Green v. Howard*, 1 B. C. C. 31; *Rayner v. Mowbray*, 3 Id. 234; *Butler v. Stratton*, Id. 369.

of *kin), to "legal representatives," (e) or, it may be presumed, to "heirs."] (d)

The objects of a gift to "relations" are not varied by its being associated with the word "near." (e) But where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the statute, would have been entitled by representation.²⁷ Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters, (f) or a living child or grandchild, the issue of a deceased child or grandchild. [And on the other hand, all who stand in the same degree must take under the will, though only some of them would have been entitled under the statute.] (g) Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir L. Kenyon, M. R., directed a distribution according to the statute; and they were held to take *per stirpes*, though it was contended, that all the relations specified should take *per capita*, including the children of a living sister. He thought, however, that the testator had a distribution according to the statute in his view; at all events, that the contrary was not sufficiently clear to induce him to depart from the common rule. The children of the living sister, therefore, were excluded. (h)

"Near" and "nearest" relations.

Nearest relations, "as sisters, nephews, and nieces."

As relations by the half-blood are within the statute, so they are comprehended in gifts to next of kin and to relations; and a bequest to the next of kin of A "of her own blood

Relations of the half-blood.

[(c) *Smith v. Palmer*, 7 Hare 225. In *Holloway v. Radcliffe*, 23 Beav. 163, "equally" was neutralized by "in like manner as under the statute;" so, *Fielden v. Ashworth*, L. R., 20 Eq. 410. In *Booth v. Vicars*, 1 Coll. 6, where the gift was to "next legal representatives of A and B, share and share alike," the words "share and share alike," were held to refer to A and B only, so as to make equal division between the stocks.

(d) *Low v. Smith*, 25 L. J., Ch. 503, 2 Jur. (N. S.) 344, *ante* p. *80. The difficulty (there mentioned) "that in that sense the property would not go equally," was apparently put by the court as an objection (which yet it overcame) to con-

struing "heirs" in the sense of statutory next of kin, not as intimating that, if it was so construed, the objects would not take in equal shares.]

(e) *Whithorne v. Harris*, 2 Ves. 527. See also 19 Ves. 403.]

27. Wms. Ex'rs (6th Am. ed.) 1207; *Hawkins on Wills* 106; 1 *Rop. on Leg.* 113; *O'Hara on Int. of Wills* 321; 2 *Redf. on Wills* 87.

(f) *Pyot v. Pyot*, 1 Ves. 335; *Marsh v. Marsh*, 1 B. C. C. 293; *Smith v. Campbell*, 19 Ves. 400, *Coop.* 275. But see *Edge v. Salisbury*, Amb. 70.

[(g) See *Withy v. Mangles*, 4 Beav. 358, 10 Cl. & Fin. 215, *ante* p. *108.]

(h) *Stamp v. Cooke*, 1 Cox 234.

and family as if she had died *sole*, unmarried, and intestate," has received the same construction. (*i*)

A gift to next of kin or relations, of course, does not extend to relations by affinity, (*k*) unless the testator has subjoined to the gift expressions declaratory of an intention to include them. ²³ *Such, obviously, is the effect of a bequest expressly to relations "by blood or marriage, (*l*) [or of a gift by a married man "to nephews and nieces on both sides.""] (*m*)

It is clear that a gift to next of kin or relations does not include a husband (*n*) or wife; (*o*) nor is a wife included in a bequest to "my next of kin, as if I had died intestate;" (*p*) the latter words being considered not to indicate an intention to give to the persons entitled under the statute at all events; *i. e.* whether next of kin or not. [But under a bequest to the persons who under the statute would be entitled as on an intestacy, (*q*) or to "legal" or "personal representatives," (where those words are held to mean persons entitled as upon an intestacy,) (*r*) in either of these cases a wife

(*i*) Cotton v. Scarancke, 1 Mad. 45.

(*k*) Maitland v. Adair, 3 Ves. 231; [Harvey v. Harvey, 5 Beav. 134. See Craik v. Lamb, 1 Coll. 489, 494.]

28. Wms. Ex'rs (6th Am. ed.) 1207; 1 Rep. on Leg. 118; O'Hara on Int. of Wills 320, 323; 2 Redf. on Wills 87; Ennis v. Pentz, 3 Bradf. 382; Storer v. Wheatland, 1 Penna. St. 506; Esty v. Clark, 101 Mass. 36. In Huling v. Fenner, 9 R. I. 411 "*relations*" are defined to be all persons who are descended from a common ancestor — synonymous with "*kindred*" or "*family*."

(*l*) Devisme v. Mellish, 5 Ves. 529.

[(*m*) Frogley v. Phillips, 30 Beav. 168, 3 D., F. & J. 466. As to what will or will not suffice to include particular relations by affinity, see *post* ch. XXX., § 1, and Hibbert v. Hibbert, L. R., 15 Eq. 372.]

(*n*) Watt v. Watt, 3 Ves. 244; Anderson v. Dawson, 15 Id. 537; Bailey v. Wright, 18 Id. 49, 1 Sw. 39.

(*o*) Nicholls v. Savagé, cit. 18 Ves. 53.

(*p*) Garrick v. Lord Camden, 14 Ves. 372. [See also Davies v. Bailey, 1 Ves. 84; Worseley v. Johnson, 3 Atk. 758;

Cholmondeley v. Lord Ashburton, 6 Beav. 86; Kilner v. Leech, 10 Beav. 362; Lee v. Lee, 29 L. J., Ch. 788. In *In re Collins' Trusts*, W. N. 1877, p. 87, the widow was upon the context held entitled to share, *sed qu.* In *Ash v. Ash*, 10 Jur. (N. S.) 142, the widow was admitted to a share because the will was thought to amount to a declaration of intention to die intestate. In *Hawkins v. Hawkins*, 7 Sim. 173, a fund belonging to the wife (who was illegitimate) was settled in default of issue in trust for her next of kin: she died without issue in her husband's lifetime, and it was held against the crown that the settlement was exhausted and that the husband administrator was entitled for his own benefit.

(*q*) Martin v. Glover, 1 Coll. 269; Jenkins v. Gower, 2 Coll. 537; Starr v. Newberry, 23 Beav. 436.

(*r*) Cotton v. Cotton, 2 Beav. 67, 10 Beav. 365, n.; Smith v. Palmer, 7 Hare 225; Holloway v. Radcliffe, 23 Beav. 163. Although in *Booth v. Vicars*, 1 Coll. 6, K. Bruce, V. C., used the word "*consanguinity*," he expressly guarded himself

is entitled to a share, for these terms do not imply consanguinity. In neither case would a husband be entitled. The reference, whether express or implied, to the statute excludes him (*t*); for he is not of kin and does not take his wife's estate under the statutes of distribution, (*u*) but by a right paramount.] (*x*)

*A difficulty in construing the word *relations* sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; ^{Gifts "to poor relations," how construed.} or to his *poor or necessitous* relations. 29 In the former case, the addition is disregarded, as being too uncertain; (*y*) and the better opinion, according to the authorities is, that the word *poor* also is inoperative to [admit relations beyond the limits of the statute. Thus] in *Widmore v. Woodroffe*, (*z*) a testator bequeathed one-third of his property *to the most necessitous of his relations* by his father's and mother's side. [He left a niece his sole next of kin according to the statute, and more remote relations; and it was argued for the latter that in consequence of the use of the word "necessitous" the gift ought not to be confined to those who were within the statute; but] Lord Camden said [several cases have been cited, all making the statute the rule, to prevent an inquiry which would be indefinite. Thus] it would clearly stand upon the word "relations" only, *the word "poor" being*

on a subsequent occasion, *Wilson v. Pilkington*, 11 Jur. 537, against the supposition that he intended thereby to exclude the widow. *Robinson v. Smith*, 6 Sim. 49, proceeded on special grounds, as did *Bulmer v. Jay*, 4 Sim. 48, 3 My. & K. 197.

(*t*) *King v. Cleaveland*, 26 Beav. 166, 4 De G. & J. 477; and see *In re Walton's Estate*, 25 L. J., Ch. 569, cited *ante* p. *72, n. But why should a reference to the statute be implied? Why should not the words be construed those who are entitled to the personal estate in case of intestacy? Generally those persons must be ascertained by reference to the statute; but is not that accidental? There is nothing importing consanguinity. If a woman dies leaving a husband, why should his beneficial title be worse because he is also the legal personal representative in the strict legal sense? However, the point is settled.

(*u*) *Milne v. Gilbart*, 2 D., M. & G. 715, 5 D., M. & G. 510. And see *Watt v. Watt*, 3 Ves. 244.

(*x*) Per Lord Cranworth, L. J., *Milne v. Gilbart*, 2 D., M. & G. 722. "It may be that he is entitled to administer under the statute of 31 Edw. III., c. 11, but this is a different right," *Ib.*

29. Wms. Ex'rs (6th Am. ed.) 1207; 1 Rep. on Leg. 104; O'Hara on Int. of Wills 321; 2 Redf. on Wills 88; *McNeillidge v. Galbraith*, 8 Serg. & R. 43; *McNeillidge v. Barclay*, 11 Id. 103.

(*y*) *Doyley v. Att.-Gen.*, 4 Vin. Abr. 485, pl. 16, 2 Eq. Cas. Abr. 194, pl. 15.

(*z*) *Amb. 636*, [citing *Carr v. Bedford*, 2 Ch. Rep. 146; *Griffith v. Jones*, Id. 394; and *Isaac v. Defriez and Brunsdon v. Woolledge*, both stated below. *A fortiori*, if the term be "nearest relations," *Goodinge v. Goodinge*, 1 Ves. 231.

added makes no difference. There is no distinguishing between the degrees of poverty. [That is to say, unless limited by the statute, an inquiry who are poor relations would be as "infinite" as the inquiry who are relations.] This decision may be considered to have overruled the earlier case of *Att.-Gen. v. Buckland*, (a) in which a gift to *poor relations* was extended to necessitous relations *beyond* the statutes of distribution.

[In *Widmore v. Woodroffe*, as there was only one relation within the statute, the question whether the word "poor" had any operation in still further qualifying the word "relations" did not arise. (b) But authority is not wanting to show that as between those who are within the statute the qualification is not to be disregarded. The inquiry is then not who are poor or poorest of an infinite number (which Lord Camden said there was no distinguishing,) but who are comparatively so among a limited number.]

In an early case (c) it was said that the word "poor" was frequently used as a term of endearment and compassion; as one *often says, "my poor father," &c.; and accordingly a countess [who was "a relation as near as any to the testator"] but it seems had not an estate equal to her rank, was held to be entitled to a share under a bequest to "poor relations." [This, however, is no authority upon the question what is the effect of the word "poor" when it imports poverty.]

In *Brunsdon v. Woolredge*, (d) where [by will dated 1734] B. bequeathed £500 on a certain event, to be distributed among his mother's poor relations. Also W. (the brother of B.) [by will dated 1757] devised real estates to A and his heirs, in trust to sell to pay debts, and pay the overplus to such of his mother's *poor relations*, as A, his heirs, &c., should think objects of charity; Sir T. Sewell, M. R., held [that the gift was confined to those who were within the statute; and] that the true construction of both wills was, "such of my mother's relations as are poor and proper objects." He said the difference was, that the latter gave a discretionary power to the executor, and the former did not.

(a) Cited 1 Ves. 231, Amb. 71, n., (3d ed.)
(Blunt's ed.)

(c) Anon., 1 P. W. 327.

(b) The author (Vol. II., p. 51, 1st ed.) thought the decision regarding the will of B in *Brunsdon v. Woolredge* irreconcilable with *Widmore v. Woodroffe*. But see a valuable note, *Lewin Trusts*, p. 698,

(d) Amb. 507, Dick. 380, [R. L. 1764 A. fo. 536. See also *Carr v. Bedford*, *Griffith v. Jones*, both *sup.*; *Gower v. Mainwaring*, 2 Ves. 87, 110, as to which see *Lewin Trusts*, p. 698, n. (3d ed.)

In several cases gifts to poor relations seem to have been regarded as charitable. (e) [But in most of them the intention was to create a perpetual fund.] Thus, in *Isaac v. Defriez*, (f) where a testator bequeathed an annuity to his sister for life, and after her death to his own and his wife's poorest relations, to be distributed proportionably share and share alike at the discretion of his executors: [he further gave the interest of his stock to his wife for life, and after her death directed all money then on any securities should *so continue*, and one half-year's interest he gave to one poor relation of his own, the management thereof to be at the discretion of his executors, and the other one-half to one poor relation of his wife in like manner: it was treated as a charity, and appears not to have been restricted to relations within the statute; (g) an impracticable restriction, indeed, where the trust, as here, was to have perpetual continuance.]

Gifts to poor relations when regarded as charity.

Again, in *White v. White*, (h) a legacy of £3000 "for the purpose of putting out our poor relations" apprentices, was supported as a charity. [The decree directed objects who were *ready to be put out, and the fund to be laid out from time to time.] And in *Att.-Gen. v. Price*, (i) [where a testator by his will, dated 1581, devised land to A and his heirs in trust that he and they should forever distribute according to his and their discretion amongst the testator's poor kinsmen and kinswomen and their issue £20 by the year, Sir W. Grant held it to be a charity. "It is to have perpetual continuance in favor of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

These authorities were followed by Sir J. Wickens, V. C., in *Gillam v. Taylor*, (k) where the trust was to invest in the names of the trustees, the interest to be from time to time given to such of the lineal descend-

(e) When this is the case "poor" bears the specific meaning attached to it in charity cases, see Vol. I., p. *213. That charity was not the ground of Sir T. Sewell's judgment in *Brunsdon v. Woolredge* is clear; for the subject of gift under the will of William (dated 1757) was land, or money to arise by sale of land, a gift of which to charitable uses would have been void by 9 Geo. II., c. 36 (1736.)]

(f) Amb. 595, more correctly [in n. by Blunt, and] 17 Ves. 373, n.

[(g) Amb. 596, n. (2).]

(h) 7 Ves. 423.

(i) 17 Ves. 371. So in *Hall v. Att.-Gen.*, Rolls, 28th July, 1829, Leach, M. R., held that a devise of real estate to trustees "in trust to pay the rents to such of my poor relations as my trustees shall think most deserving" was a charitable trust and therefore void as a gift of an interest in land.

(k) L. R., 16 Eq. 581; but as to the meaning of "poor" in charity cases see *Att.-Gen. v. Duke of Northumberland*, 7 Ch. D. 745.

ants of testator's uncle R. as they may severally need, and the trustees were directed to make such provision as would insure the continuance of the trust at their decease.

But although the gift is of a sum in gross, the context may show that charity is intended. Thus,] in *Mahon v. Savage*, (1) a testator bequeathed to his executor £1000, to be distributed among his (the testator's) *poor relations*, or such *other* objects of charity as should be mentioned in his private instructions. He left no instructions; and it was held by Lord Redesdale that the testator's design was to give to them as objects of charity, and not merely as relations, [that a relation within the statute who had become rich before distribution was not entitled to a share, and that a share was not transmissible to representatives (*i. e.*, of an object who died before distribution.)] He also thought that the executors had a discretionary power of distribution, and need not include *all* the testator's poor relations, [and that poor relations beyond the statute might be admitted.]

This case is clearly distinguishable from a simple gift to poor relations; for the additional words denoted that charity was the main object of the testator.

Remark on
Mahon v.
Savage

The question, however, which more than any other has been the subject of controversy in gifts to next of kin and relations, refers to the period at which the objects are to be ascertained; *in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended.³⁰ Where a devise

At what period
the next of kin
are to be
ascertained.

(1) 1 Sch. & Lef. 111.
30. "The natural and ordinary meaning of the phrase 'next of kin' is next of kin at the death of the person whose next of kin is spoken of. So to testator's next of kin, *Vantilburgh v. Hollinshead*, 1 McCart. 36, n. Such construction ought to prevail whether the will speaks of the testator's own next of kin or of the next of kin of some other person, unless the context demonstrates that such a construction would counteract the apparent intention of the testator. And the rule is not varied by the circumstance that the bequest to the next of kin is preceded by a bequest of the fund to a tenant for life or that the bequest is contingent on an

event which may or may not happen," Wms. Ex'rs (6th Am. ed.) 1211, and cases; see also *Theobald on Wills* 173; *O'Hara on Int. of Wills* 319; *Hawkins on Wills* 99. So, too, *Mortimer v. Slater*, 37 L. T. R. (N. S.) 520, 26 W. R. 134. And see *Lang's Will*, 9 W. R. 589 (1861), where the gift was to A for life, with remainder (if B died without issue) "to my own personal representatives and next of kin according to the statute," A being the sole next of kin at testator's death was held to be entitled, and on her death without issue her representatives take; so, too, *Michell v. Bridges*, 13 W. R. 200 (1864); so a gift direct to testator's next of kin, *Cusack v.*

or bequest is simply to the testator's own next of kin, it necessarily applies to those who sustain the character at his death. It is equally clear that where a testator gives real or personal estate to A (a stranger) during his life, or for any other limited interest, and afterwards to his own next of kin, those who stand in that relation at the death of the

Rood, 24 W. R. 391 (1876); or in remainder to them, *Lee v. Lee*, 1 Dr. & Sm. 85 (1860); or, failing appointment, to his next of kin "for the time being," *Moss v. Dunlop, Johns*, 490 (1859); so in a gift to wife for life, remainder to my son A when twenty-one, and if he die before, to "such person as shall be my next of kin according to the statute," the next of kin at testator's death took, A being such, though he died under twenty-one and before the testator's wife, *Harrison v. Harrison*, 28 Beav. 21 (1860); see, too, *White v. Springett*, 4 L. R., Ch. App. 300 (1869), in which case there was a gift to such of three grandchildren as should survive A, the excess over £10,000 being given, in event of only one surviving, to the persons who under the statute "would immediately after the death of the survivor be entitled, &c., in case I had at such time died intestate," and it was held that the class should be ascertained, as if testator had died at that time; but see *Lees v. Massey*, 3 De G., F. & J. 113 (1861), where the court differed as to the time of ascertaining the class taking the ultimate remainder, the gift being to daughter in fee, and if she die without issue, to testator's widow for life, with remainder to his relations (construed next of kin.) And in a marriage settlement upon the husband and wife for their lives and the life of the survivor, and on the death of the husband, if he survive, to such persons as at the wife's death would have been entitled under the statute as her next of kin, "in case she had survived her husband and died intestate," the next of kin at the husband's death were held to be entitled, *Chalmers v. North*, 28 Beav. 175 (1860); and to same effect, *Pinder v. Pin-*

der, 28 Beav. 44. While in *Morley's Trusts*, 25 W. R. 825 (1877), after life estate to A, a remainder to next of kin according to the statute, went to testator's next of kin at A's death. But "where the gift is to next of kin of a person dead at the date of the will—or in the testator's lifetime—the class is ascertained at the testator's death," *Theobald on Wills* 174-5; *Hobgen v. Neale*, 11 L. R., Eq. 48 (1870.) See also *Jones v. Oliver*, 3 Ired. Eq. 369, in which case a remainder after death of testator's wife was to be "divided amongst the next of kin of myself and my said wife," ascertained at the testator's death. In many cases where the original gift is to the parent with substitution of the issue, if the parent be dead at the time of the gift's taking effect, the issue are to be ascertained at the parent's death: *Hobgen v. Neale*, 11 L. R., Eq. 48 (1870); *In re Ridge*, 7 L. R., Ch. App. 665 (1872); *Merrick's Trusts*, 1 L. R., Eq. 551; *Heasman v. Pearce*, 7 L. R., Ch. App. 660 (1867); *Bryden v. Willett*, 7 L. R., Eq. 472 (1869); and that whether such issue (in case of remainder) survive the life tenant or not, *Martin v. Holgate*, 1 L. R., H. L. 175 (1866), and *Applebee, Re*, 21 W. R. 290, 28 L. T. R. (N. S.) 102 (1873); but see, *contra*, *Holgate v. Jennings*, 34 Beav. 79 (1864); *Penny v. Clark*, 1 De G., F. & J. 425 (1860.) And a remainder after A's death to his issue belongs to a class ascertained at A's death, *In re Corlass*, 1 L. R., Ch. Div. 460. And in a marriage settlement upon a husband and wife, and the survivor, with remainder to issue of the marriage, the issue acquire a vested right as they are born, whether they survive their parents or not, *Rutledge v. Rutledge*, *Dud. Eq.* 201.

testator will be entitled, whether living or not at the period of distribution; (*m*) there being nothing in the mere circumstance of the gift to the next of kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been "to my next of kin, *subject to a life interest in A.*" The death of A is the period, not when the objects are to be ascertained, but when the gift takes effect in possession.

Where the gift is to "the next of kin" of a person then actually dead, or who happens to die before the testator, the entire property (at least, if there be no words severing the joint tenancy,) vests in such of the objects as survive the testator. (*n*) [But where (*o*) a testator directed a sum of money to be "divided between and amongst the relations of his late wife in such manner, shares and proportions as would have been the case if she had died possessed of the said sum a spinster and intestate;" the wife had left sixteen nephews and nieces, her statutory next of kin, five of whom died before the testator; and it was argued that this was a gift to a class, and that the whole vested in those who survived the testator. Sir R. Kindersley, V. C., agreed that it would have been so, if the gift had been simply to the wife's relations; (*p*) but there was also a direction that they were to take in the manner, shares, and proportions prescribed by the statute: this they could only do by reading the will as a gift to all the relations of the wife living at her death as tenants in common; for if the survivors took the whole they *would take in different shares from those prescribed by the statute. The shares of those who died before the testator therefore lapsed.

It will be remembered, however, that in *Bullock v. Downes* the exclusion of the widow was held not to prevent the statute from governing the distribution of the whole fund among the others, as if they had been the only persons who would have been entitled in case of intes-

(*m*) *Harrington v. Harte*, 1 Cox 131. See also 3 B. C. C. 234; 4 Id. 207; 3 East 278. [Taml. 346; 4 Jur. (N. S.) 407.]

(*n*) *Vaux v. Henderson*, 1 J. & W. 388, n. There being no words of severance, the question, whether it was a gift to such of the next of kin as survived the testator, did not arise, as they were entitled *quacunqve via*; [see, however, *post* p. *130,

n. (q) See further *Philps v. Evans*, 4 De G. & S. 188; where, however, the only question was between the next of kin at the testator's death and those at the death of the tenant for life. And see *Wharton v. Barker*, 4 K. & J. 502.

(*o*) *Ham's Trust*, 2 Sim. (N. S.) 106.

(*p*) See *Lee v. Pain*, 4 Hare 250, and other cases cited *post* ch. XXX., § 2.

tacy. And in *In re Philps' Will*, (g) where the gift was to the testator's children living at the death of his wife, "or their heirs," (which is a gift to the persons entitled under the statute in the statutory proportions,) (r) it was held by Sir J. Romilly, M. R., that the next of kin of children who were dead at the date of the will must be ascertained, not at the death of the children, but at the death of the testator, because the will did not take effect until then.]

If the gift be to the next of kin or relations of a person who outlives the testator, of course the description cannot apply to any individual or individuals at his (the testator's) decease, or ^{—of person who survives testator.} at any other period during the life of the person whose next of kin are the objects of gift. (s) The vesting must await his death, and will apply to those who first answer the description, without regard to the fact whether by the terms of the will the distribution is to take place then or at a subsequent period. (t)

The rule of construction which makes the death of the testator the period of ascertaining the next of kin is adhered to notwithstanding the terms of the will confine the gift to [such of the] next of kin [as shall be] *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no further change in the construction. Indeed, it rather affords an argument the other way. Thus, where (u) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives *as should be *then living*, Lord Thurlow held, that the next of kin at the testator's death, *surviving the specified period*, were entitled; *for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years.*

[(g) L. R., 7 Eq. 151. The gift in *Vaux v. Henderson* also was to "heirs;" but the effect of a reference to the statute had not then been decided. Neither that case nor *Ham's Trust* was cited in *In re Philps' Will*.

(r) *Ante* pp. *79, *121.]

(s) *Danvers v. Earl of Clarendon*, 1 Vern. 35.

(t) *Cruwys v. Colman*, 9 Ves. 319; [*Smith v. Palmer*, 7 Hare 225; *Gundry v. Pinniger*, 14 Beav. 94, 1 D., M. & G.

502; *Walker v. Marquis of Camden*, 16 Sim. 329. As to *Booth v. Vicars*, 1 Coll. 6, and *Godkin v. Murphy*, 2 Y. & C. C. C. 351, see 1 D., M. & G. 504, 8 Hare 307.]

(u) *Spink v. Lewis*, 3 B. C. C. 355. [*Bishop v. Cappel*, 1 De G. & S. 411. The contrary construction appears to have been assumed in *Destouches v. Walker*, 2 Ed. 261, where however the gift was to such of testatrix's relations, &c.—as to which *vide inf.* p. *134, n. (c).]

The same construction prevails, though the tenant for life, at whose death the distribution is to be made, is himself one of the next of kin. As where (x) a testator bequeathed £5000 in trust for his daughter for life, and after her decease for her children living at her decease, in such shares as she should appoint; and in case she should leave no child, then as to £1000, part thereof in trust for the executors, administrators, and assigns of the daughter; and as to £4000, the remainder, in trust for the person or persons who should be his heir or heirs-at-law. The daughter died without leaving children. She and two other daughters were the testator's heirs-at-law. Sir R. P. Arden, M. R., held the heirs *at the time of the testator's death* to be entitled, from the absence of expression showing that these words were necessarily confined to another period, which, he said, required something very special. He thought the word "heirs" was to be construed as next of kin, but this it was unnecessary to determine, the daughters being entitled *quacunqve via*.

[So far the law has long been clearly settled. But notwithstanding the generality of the principle asserted by Sir R. P. Arden, it was made a question whether, if the person taking the life interest was the *sole* next of kin at the death of the testator, an intention was not *ipso facto* shown that the gift should vest in the person answering the description at the death of the tenant for life. And several authorities are to be found favoring this distinction, of which one of the first in time and importance was] *Jones v. Colbeck*, (y) where a testator devised the residue of his estate to the children of his daughter M., and until she should have children, or if she should survive them, then to the separate use of M. during her life; and after the decease of his said daughter and her children, in case they should all die under twenty-one, that the *residuum* should go and be distributed *among his relations* in a due course of administration. The daughter was the only next of kin at the testator's death. Sir W. Grant, M. R., thought it was clear that the testator intended to speak

Prior legatee for life, himself one of the next of kin.

Effect where legatee for life is sole next of kin.

(x) *Holloway v. Holloway*, 5 Ves. 399. [*Harrington v. Harte*, 1 Cox 131; *Masters v. Hooper*, 4 B. C. C. 207; *Doe d. Garner v. Lawson*, 3 East 278; *Lasbury v. Newport*, 9 Beav. 376; *Jenkins v. Gower*, 2 Coll. 537; *Wilkinson v. Garrett*, Id. 643; *Wilson v. Pilkington*, 11 Jur. 537 (settlement); *Holloway v. Radcliffe*, 23 Beav. 163; *Starr v. Newberry*, Id. 436; In re

Greenwood's Will, 31 L. J., Ch. 119, the report of which 3 Gif. 390 is wrong, see R. L., A. 1861, fo. 2402.]

(y) 8 Ves. 38. ["That case has the singular property of being often cited as an authority, always considered as open to observation, and never followed," per Stuart, V. C., 1 Sm. & Gif. 122.]

of relations not at the time of his own death, but at that of his daughter or her issue under twenty-one. He deemed it impossible, that the testator could mean that the relations who were to take in that event were the daughter herself, who the testator evidently thought would survive him, [and to whom the expression "my relations" was in the opinion of the M. R. quite inappropriate.]

Again, in *Briden v. Hewlett*, (z) where a testator bequeathed all his personalty in trust for his mother for life, and after her

Effect where prior legatee for life was sole next of kin.

decease, unto such persons as she by will should appoint; and in case his mother should die without a will, then to *such person or persons as would be entitled to the same by virtue of the statute of distributions*. The mother was the testator's sole next of kin at his death; and Sir J. Leach, M. R., held that she was not entitled absolutely in this character, and that the property devolved to the testator's next of kin at the time of the decease of the mother. "It is impossible," said his Honor, "to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the statute of distributions. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of his mother."

So where property was given to a testator's next of kin in defeasance of a prior gift in favor of persons, who, if they survived him, would be his next of kin at his death, the gift was considered as pointing to next of kin at a future period.

Bequest in defeasance of a prior gift to the persons who are presumptive next of kin.

As where (a) a testator bequeathed the residue of his personal estate, upon trust (among other things) to raise the sum of £200, and pay the same to his son J., and he gave the interest of the residue of the personalty to his (testator's) widow for life; and, after her decease, one moiety to his son C., and the other moiety to J. By a codicil he declared, that in case his son C. should die in the lifetime of the testator's widow, and his son J. should be living, he gave to J. the share of C.; but, in case C. and J. should both die in the lifetime of the testator's wife, he directed *that, after her decease, the whole of the residue of his personal estate, after securing a certain annuity, should go to and be divided among *all and every his (the testator's) next of kin*

(z) 2 My. & K. 90. But see *Harvey v. Harvey*, 3 Jur. 949, *post*. (a) *Miller v. Eaton*, Coop. 272.

in equal shares. C. and J. survived the testator, and died in the lifetime of the widow. Sir W. Grant, M. R., held that, as the testator had given by express bequest to his sons, who were his next of kin living at his death, he must, when he used the term "next of kin," have meant his next of kin at some other period than at his decease, and, therefore, that the next of kin *at the death of the widow*, and not at the death of the testator, were entitled. It is to be observed, how-

Remark on
Miller v.
Eaton.

ever, that the sons, even if they survived the testator, were not necessarily his sole next of kin at his death, as he might have had other children.

And the circumstance, that the prior legatee, whose interest, on his death without issue, or other such contingency, is divested in favor of the ulterior gift to the testator's next of kin, was one of such next of kin at the time of his (the testator's) death, has been deemed a [strong] ground for construing the words to import next of kin at the happening of the contingency.

Effect where
such person
was one of
next of kin.

Thus, in *Butler v. Bushnell*, (b) where a testator bequeathed certain shares in his residuary estate to his daughters, and directed that their respective shares should be held in trust for their separate use for their lives, and after their respective deceases, for their children; and in case there should be no child or children of his daughters respectively who should attain twenty-one or marry, then *in trust for such person or persons who should happen to be his (the testator's) next of kin according to the statute of distributions.* One of the daughters, who survived the testator, died without issue; and Sir J. Leach, M. R., decided that her share devolved to the testator's next of kin at the decease of the daughter, and not to the next of kin at his own death, on the ground of the improbability that the testator should mean to include, as one of his next of kin, the person upon whose death, without issue, he had expressly directed that the property should go over, [and of the prospective nature of the words, "who should happen to be."

In none of the cases, indeed, except *Miller v. Eaton*, was the fact of the prior legatee being the sole next of kin at the testator's death the only ground relied upon. In *Jones v. Colbeck*, the M. R. remarked on the inapplicability of the term "my *relations" (c) to an only daughter; and in *Briden v. Hewlett* Sir J.

Remark on the
preceding
cases.

(b) 3 My. & K. 232.

[(c) It was held by Romilly, M. R., in *Tiffin v. Longman*, 15 Beav. 275, *ante* p. 122, that "relations" had not such neces-

sary reference to the time of the death of the *propositus* as "next of kin;" and the like of "legal personal representatives," in *Holloway v. Radcliffe*, 23 Beav. 163.

Leach laid much stress on the words "would be," as importing a future contingency upon which the next of kin were to be ascertained. In *Butler v. Bushnell* too, which, from his own point of view, is a weaker case than the others, (since the tenant for life was only one of the next of kin,) he laid similar stress on the words "should happen to be." But the effect given to those additional grounds of argument is scarcely to be reconciled with the principle which may be considered to be now established, that, as infinite variations may take place in the expectant next of kin, either by deaths, or births, or both, in the interval between the making of the will and the death of the testator, it is not to be assumed, in the absence of a clear context, that the testator lost sight of the probability of such variation; and without that assumption the testator's supposed intention in favor of or against particular persons as his next of kin can possess little or no weight. The argument drawn from the inapplicability of the description used to the person eventually answering to it thus falls to the ground; since the testator may have chosen to give to that person] by a description which, if he died in his lifetime, would carry his bounty to other objects. [Again, words which are expressive of futurity without pointing to any definite period are satisfied when referred to the time of the testator's death; and, being themselves ambiguous, ought not to be allowed to control the known legal meaning of such words as "next of kin." At the present day it is not probable that such decisions would be made as those in *Briden v. Hewlett* and *Butler v. Bushnell*. (d)

One of the earliest cases in which these principles were practically enforced was] *Pearce v. Vincent*, (e) where a testator devised lands to his cousin, T. Pearce, *for life*, and after his decease, to such of the testator's relations of the name of Pearce (being a male) as his cousin T. Pearce should by deed appoint, and, in default of appointment, to such of the testator's relations of the name of Pearce (being a male) as T. Pearce should adopt, if he should be living at the time of the decease of *T. Pearce; and, in case T. Pearce should not have adopted any such male relation of the testator, or, in case he should have done so, and there should not be any such male relation living at the decease of T. Pearce, then the testator devised the property to *the next or nearest relation or nearest*

Tenant for life being sole next of kin, held not sufficient to exclude him from a devise to "next of kin."

(d) See *Holloway v. Holloway*, 5 Ves. 119.]
 399; *Doe d. Garner v. Lawson*, 3 East (e) 1 Cr. & M. 598, 2 My. & K. 800,
 278; *Stert v. Platel*, 5 Bing. N. C. 434; 2 Scott 347, 2 Bing. N. C. 328, 2 Kee.
In re Greenwood's Will, 31 L. J., Ch. 230.

of kin of himself of the name of Pearce (being a male), or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, executors, administrators, and assigns, forever. The will also contained a power to T. Pearce to lease for any term not exceeding seven years. T. Pearce, the tenant for life, died without issue, and without having executed the powers of appointment or adoption given by the will. The nearest of kin of the testator living at the time of his decease (which occurred in 1814) were—first, his cousin T. Pearce (the devisee for life) aged sixty-seven; secondly, his cousin Richard Pearce, the son of another uncle, and who was aged sixty-six; and, thirdly, William Pearce, a younger brother of Richard. The testator had a brother named Zachary, who, if living at his death, would have been his nearest of kin; but it appeared that he went to sea, and had not been heard of since 1795. The question was, what estate, assuming Zachary to have died without issue in the lifetime of the testator, Thomas or Richard took under the ultimate limitation? On a case from chancery the Court of Exchequer certified that Thomas took an estate in fee in the real estate, and the absolute interest in the personalty. Sir J. Leach, M. R., being dissatisfied with this, sent a case to C. P., the judges of which were of the same opinion; and these certificates, after some argument, were confirmed by Lord Langdale (who had in the meantime succeeded Sir J. Leach at the Rolls), and whose judgment contains a very clear statement of the principle of the decision. He said, “The question is, whether Thomas Pearce, being devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation, which he afterwards filled? It is tolerably clear, that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been divested by the appointment of Thomas Pearce, or by his adoption of a male relation of the name of Pearce, but was, in default of such appointment or direction, to take effect. If *it should so happen that Thomas Pearce, the devisee for life, should also at the death of the testator answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued that he ought, because the gift to Thomas Pearce for life and the restrictions.

put upon him in his character of tenant for life are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply to this case; and I am of opinion that upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given."

[That bequests of personalty are subject to the same rule of construction is also clearly decided. Thus in *Urquhart v. Urquhart*, (*f*) where a testator bequeathed his personal estate to his daughter if she survived her mother and had issue, but if she died before her mother, then on the wife's death one moiety to belong to his own nearest of kin, and the other moiety to his wife's nearest of kin; at the date of the will and of the testator's death the daughter was his sole next of kin, she never had issue, and died before the wife, and her representative was held entitled under the ultimate bequest of the first moiety. The V. C. said "The rule is that the persons who are designated by any description, must be the persons who answer that description according to the legal sense of those words, unless on the face of the instrument you find that the testator himself has put a construction on those words, and shown that he does not mean to use them in their natural ordinary and legal sense:" and he thought there was nothing to control that sense except the mere *surmise* arising out of the previous bequest to the daughter.

Same construction with regard to bequest of personalty.

So, in *Seifferth v. Badham*, (*g*) where a testator gave personal property in trust, after the decease of his wife, for his children (who were then and at his death his sole next of kin,) but if they should die without leaving issue, to assign the property "unto and equally between his next of kin according to the *statute," it was held by Lord Langdale, M. R., that the children were entitled under the ultimate gift.

Again, in *Nicholson v. Wilson*, (*h*) where the bequest was in trust for the testator's daughter A for life, remainder to such of his children B, C and D as should be living at the death of A, and if only one *then* living, to that one; but if all his children were *then* dead, then to his

[*(f)* 13 Sim. 613.

[*(g)* 9 Beav. 370.

[*(h)* 14 Sim. 549.

personal representatives: it was contended that as "then" was here clearly used as an adverb of time, the representatives must be such as answered the description when the specified contingency happened; but Sir L. Shadwell, V. C., thought the argument was founded entirely upon conjecture, and that conjecture did not authorize the court to depart from the plain meaning of the words which were found in the will, and which meant next of kin at the testator's death.

These and other similar cases (*i*) have settled the law on this much disputed point.

In all the foregoing cases the bequests were to the testator's own next of kin. A similar rule prevails where the gift is to the next of kin of a third person preceded by an express devise to the individual who is such person's expectant, next of kin. Thus, in *Stert v. Platel*, (*k*) where lands were devised to R. H. for life, remainder to his sons successively in tail, remainder to A. D. H. for life, remainder to his sons in like manner, remainder to "such person bearing the name of H. as *shall* be the male relation nearest in blood to R. H.:" (*l*) it was held by the Court of C. P., that A. D. H. being the nearest relation of R. H. at the time of the testator's death, had an immediately vested remainder under the ultimate limitation in the will. It will be observed that the same individual being the nearest relation of R. H. at his death and at the death of the testator, no person was concerned to raise the question at which of those two periods the remainder should be held to vest. (*m*)

It remains to consider those cases in which, independently of the circumstance that the gift to next of kin is preceded by a gift to the individual who happens to answer that description at the *death of the testator or other ancestor, the context has been held to show an intention to refer to some other persons than those who answer the description at that time. *Bird v.*

(*i*) *Ware v. Rowland*, 15 Sim. 587, 2 Phill. 635; *Baker v. Gibson*, 12 Beav. 101; *Murphy v. Donegan*, 3 Jo. & Lat. 534; *Bird v. Luckie*, 8 Hare 301; *Jennings v. Newman*, 10 Sim. 219; In re *Barber's Will*, 1 Sm. & Gif. 118; *Gorbell v. Davison*, 18 Beav. 556; *Markham v. Ivatt*, 20 Id. 579; *Harrison v. Harrison*, 28 Id. 21; In re *Lang's Will*, 9 W. R. 589; *Mortimore v. Mortimore*, 4 App.

Cas. 448. And in the case of settlements, *Elmsley v. Young*, 2 My. & K. 82, 780; *Smith v. Smith*, 12 Sim. 317; *Allen v. Thorp*, 7 Beav. 72.

(*k*) 5 Bing. N. C. 434.

(*l*) These terms were considered equivalent to a bequest to next of kin, see per *Bosanquet, J.*, 5 Bing. N. C. 441.

(*m*) *Ante* p. *130.

Wood (n) is generally cited on this point, but it appears to be an instance rather of the exclusion by force of the context of the true next of kin in favor of more remote relations than of the postponement of the period at which the legatees should be ascertained. The bequest was to the testatrix's daughter for life, and after her death, as she should appoint, and in default of appointment, to her (the testatrix's) next of kin, *to be considered as a vested interest from the testatrix's death*, except as to any child afterwards born of her daughter. The daughter having died childless and without making any appointment, Sir J. Leach, V. C., held that by the exception the testatrix had shown what class she meant to designate as her next of kin, namely, her grandchildren; *and they were to take vested interests at her (the testatrix's) death*: the daughter was therefore excluded. (o)

But the mere exception from a gift to the next of kin of persons who if the tenant for life were out of the way would, as matters stand at the date of the will, be included among the next of kin, is not sufficient reason for departing from the general rule: for this would be to assume that the testator expected the state of his family to remain the same at his death as at the date of the will, an assumption which we have already seen ought not to be made. It may very well be that the testator introduced the exception with this view, that if the tenant for life should die in his lifetime and his next of kin should consist of the class to which the excepted persons belonged, those persons should be excluded from the bequest, and if the matter is thus left in doubt the general rule prevails. (p)

In *Cooper v. Denison*, (q) where a residue was bequeathed in trust, in case the testator's daughter survived her mother, for her at her mother's death; and in case the mother survived the daughter (which event happened) then in trust for the mother for life, and at her decease, a third part to be paid and applied according to her will, and the other two-thirds to his *other* the *next of kin of his paternal line. The daughter was sole next of kin *ex parte paterna* at the death, and

(n) 2 S. & St. 400, corrected 2 My. & K. 86, 89.

(o) See also *Eagles v. Le Breton*, L. R., 15 Eq. 148, *ante* p. *122.

(p) *Lee v. Lee*, 1 Dr. & Sm. 85. Although the facts were found not to raise the point, Kindersley, V. C., expressed a clear opinion upon it. Cf. *In re Crawhall's Trust*, 8 D., M. & G. 480 (gift to

"children, except issue of A," who was a deceased child.)

(q) 13 Sim. 290. In *Minter v. Wraith*, Id. 52, the next of kin were ascertained at the period of distribution, for reasons similar to those which were rejected in *Urquhart v. Urquhart*, *sup.* See 4 K. & J. 500.

the V. C. held, first, that she was excluded by force of the word "other;" and, secondly, that it was clear that all the persons who were to take at the mother's death were meant to be ascertained simultaneously, while those who were to take *her* one-third *could* not (owing to the power) be ascertained until her death, it followed that the persons to take the other two-thirds were also to be ascertained at the mother's death.

Clapton v. Bulmer (r) involved the construction of a peculiarly worded instrument. The testator bequeathed his residue to trustees in trust for his daughter for life, and after her death for her children; but if she died without leaving any children, he directed his trustees *upon her decease to raise and pay £3000 as she should by will appoint*, and if his wife survived his daughter and his daughter died childless, *then* his trustees were to raise and pay the further sum of £2000 to his wife, and "assign and transfer the residue to the nearest of kin of his own family forever." Sir L. Shadwell, V. C., understanding "family" to mean *children*, held the bequest to be to the next of kin *of the daughter*. Upon appeal, Lord Cottenham thought this might have been the testator's meaning, but if not, it meant his own next of kin at his daughter's death, for in no case was there such strong demonstration to be found that the legatee was to be ascertained at a future period. Between these two constructions it was unnecessary to decide, since the same individual answered both descriptions.

Where there is an *express* gift in remainder to next of kin, subject to a power of appointment in the legatee for life, the objects of the gift are of course to be ascertained without regard to the existence of the power, which, unless exercised, has no operation on the question. But

where such a gift is implied from a power to appoint by will, then the death of the donee is the period to be regarded, whether the power be one of selection, (s) or only of distribution.] (t)

Rule where gift to next of kin is implied from a power.

Of course, if property be given upon certain events to such persons as shall *then* be next of kin or relations of the testator, the persons standing in that relation at the period in question, *whether so or not, (u) [or not solely so,] (x) at the

Gift expressly to next of kin at a future period.

(r) 10 Sim. 426, 5 My. & C. 108.

(t) *Pope v. Whitcombe*, 3 Mer. 689,

(s) *Att.-Gen. v. Doyley*, 4 Vin. Abr. corrected Sug. Pow. 953 (8th ed.), *ante* 485; *Harding v. Glyn*, 1 Atk. 469, cit. 5 Vol. I., p. *553.]

Ves. 501; *Cooper v. Denison*, 13 Sim. 290. (u) *Long v. Blackall*, 3 Ves. 486;

[(x) *Boys v. Bradley*, 10 Hare 389, 4 D., M. & G. 58.

death of the testator, are, upon the terms of the gift, entitled. [But if the gift is, not to those who will then be, but to those who will (or would) then be entitled as, next of kin by statute, the word "then" will be understood as referring to the period when they will be entitled in possession. The persons to take will be, not those who would have been entitled if the testator had *then* died, (y) but those who would *then* be entitled if the testator, when he died, had died intestate. (z) Moreover "then" has more meanings ^{"Then" not always an adverb of time.} than one, each equally common: it may mean "at that time" or "in that case;" (a) and unless the latter meaning be excluded by the context, it will be adopted rather than construe "next of kin according to the statute" (the statute being expressly referred to,) as meaning something different from what the statute says it means. Thus, in *Cable v. Cable*, (b) where a testator bequeathed a fund in trust for his wife for life, and at her death to be paid to his children; but if he left no children at his decease, then to become the property of the person or persons who would *then* become entitled to take out administration as

[*Horn v. Coleman*, 1 Sm. & Gif. 169. In *Wharton v. Barker*, 4 K. & J. 483, the gift (after a previous life estate and failure of children) was of one-half to the persons "who shall then be considered as my next of kin" according to the statute, and of the other half to the persons "who shall then be considered as the next of kin (by statute) of my deceased wife." The decision on the former half was influenced by the construction made as to the latter: without this some of the V. C.'s remarks show more reliance on existing circumstances than is quite consistent with modern authority. In *Wheeler v. Addams*, 17 Beav. 417, "then" was construed "in that case," not "at that time."] It should be observed that *Jones v. Colbeck* and *Miller v. Eaton* have been cited by a respectable text writer, as authorities for the position that a bequest to the next of kin, after a life interest, refers to those who answer the character at that time, 1 Rob. on Wills (3d ed.) 432. This is not only directly opposed to the general principles which govern the vesting of estates (*ante* Vol. I., p. *799), but also to the strong line of

authorities before cited in support of the contrary general rule; to which may be added *Holloway v. Holloway*, and other cases of the same class before mentioned. It is, moreover, inconsistent with the principle on which Sir W. Grant rested his decision in each of the first-mentioned cases themselves, as will be seen by a perusal of his judgments.

(y) If the case is expressly put of the *propositus* dying at some time other than that at which he actually died, all doubt is of course removed, *Pinder v. Pinder*, 28 Beav. 44; *Chalmers v. North*, Id. 175; *Bessant v. Noble*, 26 L. J., Ch. 236, 2 Jur. (N. S.) 461.

(z) *Bullock v. Downes*, 9 H. L. Cas. 1, 19; *Mortimore v. Mortimore*, 4 App. Cas. 448, affirming *Mortimer v. Slater*, 7 Ch. D. 322; *Mitchell v. Bridges*, 13 W. R. 200. In re *Morley's Trusts*, 25 W. R. 825, W. N. 1877, p. 159, is *contra*, *sed qu.*

(a) See 7 H. L. Cas. 119.

(b) 16 Beav. 507; see also *Wheeler v. Addams*, 17 Beav. 417; *Lees v. Massey*, 3 D., F. & J. 113; *Moss v. Dunlop*, Joh. 490 ("next of kin for the time being.")

his personal representative or representatives, under the statute of distribution, as if he had died intestate and "*unmarried*." The testator left no children, and Sir J. Romilly, *M. R., held that, as the word "*unmarried*" showed that the testator was contemplating a period before his wife's death, the word "*then*" should be construed as "*thereupon*," in order to make the whole consistent.] (c)

VII.—Sometimes it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name. ^{Gifts to persons of testator's name.} The word "*name*," so used, admits of either of the following interpretations:—First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense); and, secondly, as denoting a person of the testator's family; the word "*name*" being, in this case, synonymous with "*family*" or "*blood*." The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the word "*name*," if otherwise construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

Thus, where a testator gives to the next of *his kin* of his name, (d) or to the next of his name *and blood*, (e) it is evident that he does not use the word "*name*" as descriptive of his relations or family only, because that would be the effect if the mention of the name were wholly omitted and the gift had been simply to his next of kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name, (f) there is ground to presume that he intends

(c) But did not "*then*" refer to the period last mentioned, namely, the testator's own death without leaving children? *Archer v. Jegon*, 8 Sim. 446.]

31. See 1 Rep. on Leg. 114; Wms. Ex'rs (6th Am. ed.) 1207.

(d) *Jobson's Case*, Cro. Eliz. 576.

(e) *Leigh v. Leigh*, 15 Ves. 92.

(f) But see *Bon v. Smith*, Cro. El. 532, where a declaration by the testator, that, in a certain event, lands should remain to the next of his name, was considered to require that the devisee should have borne the testator's name. The point,

merely to point out the *persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in *Pyot v. Pyot*, (g) where a point of this nature underwent much discussion. A testatrix devised her estate, real and personal, to trustees, and their heirs, executors, administrators and assigns, in trust, first for her daughter Mary, and her heirs, executors, administrators and assigns forever; provided that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix there were three persons then actually of the name of Pyot, namely, the plaintiff, and also his two sisters who were then unmarried, but who married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix, was not of that name. An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir-at-law, but who, of course, was one degree more remote than the others. On behalf of the heir-at-law, it was insisted—First, that this devise to the “nearest relation” was void for uncertainty, because the word “relation” was not *nomen collectivum*; for no words were of that description, except such as had no plurals: Secondly, that if it was not void, then the heir-at-law was the person meant by “nearest relation;” for the testatrix had in view a single person, and could not intend to give it to all her relations. But Lord Hardwicke said, that a devise was never to be construed absolutely void for uncertainty, unless from necessity; and if this necessarily related to a single person, it would be so, as there were several in equal degree of the name of Pyot. But he did not take it so: the term “relation” was *nomen collectivum* as much as heir or kindred. “Then,” continued he, “taking this to be *nomen collectivum*, as I do,

To the “nearest relation of the name of the Pyots.”

however, did not call for adjudication; and the propriety of the *dictum* was (as we shall see) questioned by Lord Hardwicke, in *Pyot v. Pyot*, 1 Ves. 337, *post*, who seems to have included in his condemnatory strictures Jobson's Case, Cro. El. 576, where the language of the will was different; the devise being “to the next of kin of my name,” and which, therefore, according to the reasoning in the text, was properly construed as importing that the devisee should, in addition to being of the testator's family, bear his name.

(g) 1 Ves. 335 (Belt's ed.)

there is no ground in reason or law to say, the plaintiff should be the only person to take; because there is no ground to construe this description to refer to the actual bearing the name at that time, but to refer to the stock 'of the Pyots.' If it refers to the name, suppose a person of nearer relation than any of those now before the court, but originally of another name, changing it to Pyot by act of parliament, that would not *come within the description of nearest relation of the name of Pyot; for that would be contrary to the intention of the testatrix; and yet that description is answered, being of the name of Pyot, and, perhaps, nearer in blood than the rest. Then suppose a woman nearer in blood than the rest, and marrying a stranger in blood of the name of Pyot; that would not do; and yet, at the time of the contingency, she would be of the name. In *Jobson's Case*, and in *Bon v. Smith* (which was a case put at the bar by Sergeant Glanville, which was often done in those times, but cannot be any authority), *it is next of kin of my name, (h)* which is a mere designation of the name, and is expressed differently here. It may be a little nice; but, I think, '*the Pyots*' describe a particular stock, and the name stands for the stock; but yet it does not go to the heir-at-law, as in the case of *Dyer, (i)* because it must be *nearest relation*, taking it out of the stock; from which case it also differs, as the personal is involved with the real; and it was meant that both should go in the same manner; and shall the personal go to the heir-at-law? Then this plainly takes in the plaintiff and his two sisters unmarried at the time of making the will, although married before the contingency; and I think the other sister, not before the court, is equally entitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix."

[So, in *Mortimer v. Hartley, (k)* where a testator devised lands to his son J., on condition that neither he nor his heirs should sell the same, "it being the testator's desire that they should be kept in the *Westerman's name*," and if J. died without leaving lawful issue, then the testator's daughter A to have her brother's share *subject to the same restrictions*, it was held that the word "name" must be construed to mean "family" or "right line," for the son J. was held to take an estate tail, and the daughter was to take

To be kept in the W.'s name. "Name" held to mean family.

(h) This is not accurate; *vide ante* p. *91.

*141, n. (f).

(k) 6 Exch. 47.

(i) *Chapman's Case*, *Dyer*, 333 b, *ante*

subject to the same restrictions, that is, an estate tail also, in which case the lands would devolve upon persons not bearing the name of Westerman.

It seems to have been thought in *Carpenter v. Bott*, (l) that the word "surname" was more easily convertible with "family" or "stock" than the word "name." T. Crump, the testator in that case, bequeathed a fund, in the event (which happened) of *his niece dying without leaving issue, "amongst his *next of kin of the surname of Crump*, who should be living at the decease of his niece, in like manner as if his said next of kin had become entitled thereto under the statute of distributions." At the death of the testator, his sole next of kin bearing the name of Crump, was a lady who afterwards married the plaintiff during the life of the niece, and Sir L. Shadwell, V. C., thought the expression "of the surname" was to be taken in the sense attributed by Lord Hardwicke to the words "of the (name of the) Pyots," namely, "of the stock:" and therefore that Mrs. Carpenter was entitled.] (m)

Where a gift to persons of the testator's name is held, according to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage. As in *Jobson's Case*, (n) often before cited, which was a devise of lands in tail, the remainder to the next of kin of the testator's name. The next of kin, at the date of the will, and also at the death of the testator, was his brother's daughter, who was then married to J. S.; and, on the death of the tenant in tail, without issue, the question was, whether she should have the land? and it was held, that she should not, because she was not then of the name of the devisor. [But if a person has acquired a new name by royal license or by act of parliament, he has not therefore lost his original name, for the license or statute is simply permissive, and leaves the person at liberty to resume his original name; so that a new name so acquired would probably be held no obstacle to his taking by a description of which the old name was a part.] (o)

As to females losing name by marriage.

Name assumed by license or act of parliament may be laid aside.

(l) 15 Sim. 606.

(n) Cro. El. 576. See also *Bon v. Smith*, Id. 332; [*Doe d. Wright v. Plumtre*, 3 B. & Ald. 474.

(m) The question whether it would have been necessary that the surname (if literally construed) should be borne at the niece's death was not decided. As to this question see end of this chapter.]

(o) See per Lord Eldon, *Leigh v. Leigh*, 15 Ves. 100.]

Another question is, whether gifts of this nature apply in cases the converse of the last, *i. e.*, to a person who, being originally of another name, has subsequently acquired the prescribed name by marriage, or by voluntary assumption, either under the authority of a royal license, or the still more solemn sanction of an act of parliament, or without any such authority. (*p*)

In *Leigh v. Leigh*, (*q*) the testator, after limiting estates to his *two sisters and their issue in strict settlement, devised the property, on failure of those estates, to the first and nearest of his kindred, being male *and of his name and blood*, that should be living at the determination of the estates before devised, and to the heirs of his body; Lord Eldon, with Thompson, B., and Lawrence, J., held, that a person, who answered the other parts of the description, but of another name, was not qualified, in respect of the name, by his having, before the determination of the preceding estates, obtained a royal license that he and his issue might use the surname of Leigh instead of his own name, and having since assumed it. That the design of the testator, in this case, was the exclusion of the female line, and that he was not influenced solely by attachment to the name, (one of which objects he must have had in view,) appeared from his not having imposed the obligation of assuming his name upon the issue of his sisters taking under the prior limitations.

The remaining question, applicable to the gifts under consideration, is, at what time the devisee or legatee must answer the prescribed qualification or condition in regard to the name, supposing the will to be silent on the point.

If the devise confers an estate in possession at the testator's decease, that obviously is the point of time to which the will refers; and even where the devisee might, in other respects, take at the testator's decease an absolutely vested estate in remainder, it should seem that the same construction prevails. Such was the unanimous opinion of the court in the two early cases of *Bon v. Smith* (*r*) and *Jobson's Case*, (*s*) where lands were devised to A in tail, with remainder to the next of the testator's name, or the next of kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had answered the description *at the death of the testator*, would have been entitled.

(*p*) As to the voluntary assumption of a name, *ante* p. *56.

(*q*) 15 Ves. 92.

(*r*) Cro. El. 532.

(*s*) Cro. El. 576.

But in *Pyot v. Pyot*, (t) Lord Hardwicke considered, that a different rule is applicable to executory devises, which are fettered with such a condition. The devise there was (as we have seen) to A and her heirs, and, in case she should die before twenty-one or marriage, then to the testator's nearest relation of the name of the Pyots; and his lordship expressly distinguished the case before him from Jobson's Case, where he said it was not a contingent limitation over upon a fee devised precedent, nor was it a contingent but a vested remainder, and therefore re*ferred to the time of making the will (*quære*, the death of the testator?) whereas, in the case before the court, the description of the person must refer to the time of the contingency happening; viz. such as, at that event, should be the testator's nearest relation of the name of the Pyots. (u)

If such a construction can be sustained, it must embrace all executory gifts to persons answering a prescribed character, as, to next of kin, heir, and other such persons; for it is difficult to perceive any valid reason for making the gifts under consideration the subject of any peculiar rule in this respect; and, as general doctrine, his lordship's proposition would have to contend with a large amount of authority, including those cases in which (as we have seen) the words "next of kin" have been held to designate the next of kin at the time of distribution, on other special grounds, (x) for it would have been idle to discuss the question, whether an executory gift to the next of kin applied to the person answering the description of next of kin when such gift took effect in possession, on the special ground that the prior legatee was sole next of kin, or one of the next of kin at the death of testator, if, by the general rule, an executory bequest to next of kin applied to the persons answering the description when the bequest took effect in possession.

Remarks upon
Lord Hard-
wicke's doc-
trine in *Pyot v.*
Pyot.

(t) 1 Ves. 335 (Belt's ed.); *ante* p. *142. vies, 2 Scott 74; *ante* p. *56.

(u) See further, on this point, *Gulliver v. Ashby*, 4 Burr. 1940; *Lowndes v. Davies*, 2 Scott 74; *ante* p. *131.

*CHAPTER XXX.

DEVISES AND BEQUESTS TO CHILDREN.

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| <p>I. <i>Whether they include Grandchildren.</i></p> <p>II. <i>What class of Objects, as to period of birth, they comprehend; where, 1. The Gift is immediate, i. e., in Possession; 2. There is an anterior Gift; 3. Possession is postponed till a given Age; 4. Effect where no Object exists at the time of its falling into Possession; 5. Words "born" or "begotten," or "to be born or begotten," &c.; 6. As to Children en ventre.</i></p> | <p>III. <i>Clauses substituting Children for Parents.</i></p> <p>IV. <i>Children described as consisting of a specified number, which differs from the actual number.</i></p> <p>V. <i>Whether Children take per stirpes or per capita.</i></p> <p>VI. <i>Limitation over, as referring to having or leaving Children.</i></p> <p>VII. <i>Gifts to younger Children.</i></p> |
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I.—The legal construction of the word *children* accords with its popular signification; (a) namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue. (b) It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child.¹ Thus,

Children, how construed.

Whether it extends to grandchildren, and when.

(a) The French word *enfants*, received the same construction in *Duhamel v. Ardouin*, 2 Ves. 162. [But see *Martin v. Lee*, 9 W. R. 522.]

(b) *Wythe v. Blackman*, Amb. 555, 1 Ves. 196; *Gale v. Bennett*, Amb. 681; *Chandless v. Price*, 3 Ves. 99; *Royle v. Hamilton*, 4 Ves. 437; [and other cases, ante p. *107, n. (e).]

1. "*Children*" has been held not to mean "*grandchildren*" in most cases, where a different intention is not manifest in the will or made necessary implication from the circumstances. *Wms. Ex'rs* (6th Am. ed.) 1182; 2 Redf. on Wills 14; 1 *Rep.* on Leg. 68; *O'Hara* on Int. of

Wills 310; *Theobald* on Wills 138; *Hawkinson* on Wills 84; *Flood* on Wills 514; *Cutter v. Doughty*, 23 Wend. 513; *Brokaw v. Peterson*, 2 McCarter 194; *Feit v. Vanatta*, 6 C. E. Gr. (N. J.) 85; *Turner v. Withers*, 23 Md. 18, "my remaining children;" *McGuire v. Westmoreland*, 36 Ala. 594; *McLeod v. Dell*, 9 Fla. 443; *Walker v. Williamson*, 25 Ga. 549; *Willis v. Johnson*, 30 Ga. 167; *Churchill v. Churchill*, 2 Metc. (Ky.) 466; *Hopson v. Skipp*, 7 Bush 647; *Sheets v. Grubbs*, 4 Metc. (Ky.) 340; *Phillips v. Beall*, 9 Dana 14; *Yeates v. Gill*, 9 B. Mon. 204; *Osgood v. Lovering*, 33 Me. 464; *Thomson v. Ludington*, 104 Mass. 193; *Ewing v. Handley*,

in *Crooke v. Brookeing*, (c) though the claim of grandchildren to be entitled in conjunction with a surviving child under a bequest to "children," was rejected, yet the lords commissioners considered, that, if there had been no child, they might have taken. Lord

4 Litt. 349; *Mordecai v. Boylan*, 6 Jones Eq. 365; *Boylan v. Boylan*, Phill. Eq. 160; *Ruff v. Rutherford*, 1 Bailey Eq. 17; *Snoddy v. Snoddy*, 1 Strobb. Eq. 84; *Izard v. Izard*, 2 Desaus. 308; *Hughes v. Hughes*, 12 B. Mon. 121; *Low v. Harmony*, 72 N. Y. 408; *Jackson v. Staats*, 11 Johns 337; *Lawrence v. Hebbard*, 1 Bradf. 252; *Stires v. Van Rensselaer*, 2 Bradf. 172; *Marsh v. Hague*, 1 Edw. Ch. 174; *Tier v. Pennell*, 1 Edw. Ch. 354; *Mowatt v. Carow*, 7 Paige Ch. 339; *Hone v. Van Schaick*, 3 Barb. Ch. 488 (this case was, however, reversed in 3 N. Y. 538); *Denny v. Closse*, 4 Ired. Eq. 102, "among all my children that are then living;" *Gregory v. Beasley*, 1 Ired. Eq. 25, "if either of my children die without issue, to the surviving ones;" *Ward v. Sutton*, 5 Ired. Eq. 421; *Coates v. Street*, 2 Ash (Pa.) 12 (same language as *Gregory v. Beasley*, cited above); *Dickinson v. Lee*, 4 Watts 82; *Gable's Appeal*, 40 Penna. St. 231; *Castner's Appeal*, 88 Penna. St. 478; *Gross' Estate*, 10 Penna. St. 361; *Hallowell v. Phipps*, 2 Whart. 376; *Herr's Estate*, 28 Penna. St. 467; *Jarden's Estate*, 3 Phila. 438; *Hough v. Hough*, 4 Rawle 363; *Tillinghast v. D'Wolf*, 8 R. I. 69; *Morton v. Morton*, 2 Swan 318; *Turner v. Ivie*, 5 Heisk. 222; *Tebbs v. Duval*, 17 Gratt. 349; *Moon v. Stone*, 19 Gratt. 130; *Loring v. Thomas*, 2 Dr. & Sm. 497; *Holland v. Wood*, 11 L. R., Eq. 91 (1870); *Powell v. Powell*, 28 L. T. R. (N. S., 1873.) So, too, in construing a power to appoint *children*, an appointment to *grandchildren* has been held void, *Morris v. Owen*, 2 Call 520; *Hudson v. Hudson*, 6 Munf. 352; *Carson v. Carson*, 1 Phill. Eq. 57.

But in the following cases language or circumstance has caused the word *children*

to be construed as inclusive of *grandchildren*: *Scott v. Nelson*, 3 Port. (Ala.) 452, in which a gift was to be divided among testator's *children*, on repayment by them of advances made, and advances to testator's son T., *in his lifetime*, are then mentioned—a son of the deceased son T. was held to be included among the *children*. *Ewing v. Handley*, 4 Litt. 349, in which it is said that *children* will be construed *grandchildren*, where there are no children; but it was held that A having left children living at the time of distribution, a grandchild of A, by a deceased daughter, could not take as a child. In *Houghton v. Kendall*, 7 Allen 72, the gift was to children "who may be surviving heirs of A's body," by reason of which added words, grandchildren (the issue of deceased children) were held to be included. So in *Bowne v. Underhill*, 6 Sup., T. & C. 344, where the gift was in remainder to be divided "equally among all the *children* of A who may then be living, and the lawful issue of any that may then be dead, *per stirpes* and not *per capita*." In *Whitehead v. Lassiter*, 4 Jones Eq. 79, a gift to "all my children that are *now* living" was extended to grandchildren by a child living at the date of the will, but not of a child deceased before that time. So in *Long v. Labor*, 8 Penna. St. 231, a gift to be divided "among my children who shall be living at the time of A's death and in case any of them shall be deceased, their heirs to receive," was to be shared by a *grandchild*, the son of a child of the testator, deceased in his lifetime. So in *Neare v. Jenkins*, 2 Yea. 414, a remainder to be "divided among all my other *children* or *their heirs*." So a legacy to the "*children* or *legal heirs*" of A, *Sorver v. Berndt*, 10

Alvanley, too, in *Reeves v. Brymer*, (d) laid it down, that "children may mean grandchildren, where there can be no other construction; but not otherwise." Sir W. Grant, also, seems rather to have assented to than denied the doctrine, though he refused to apply it to a case (e) in which there was a gift to the children of several persons deceased equally *per stirpes*, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children *living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same judge, on another occasion, (f) refused to let in a great grandchild under the description of "grandchildren," there being grandchildren; though he admitted, that "where there is a total want of children, grandchildren have been let in, under a liberal construction of 'children.'" No such case, however, it is conceived, can be found; and the doctrine appears to rest solely on the *dicta* of the lords commissioners who decided *Crooke v. Brookeing*, Lord Alvanley and Sir W. Grant.

If the extension of gifts to children to more remote descendants were confined to cases in which, but for this construction, the gift, *according to the state of events at the time of its inception*, (*i. e.* of the making of the will,) never could have had an object, as in the case of a gift to the children of A, a person then being, to the testator's knowledge, (g) dead, leaving grandchildren

Penna. St. 213; so, too, *Tipton v. Tipton*, 1 Coldw. 252; so, too, in *Barnitz's Appeal*, 5 Penna. St. 264, a reversion "to fall back to my *heirs* to be divided among my *children*;" *Williams v. Conrad*, 30 Barb. 524; *Hughes v. Hughes*, 12 B. Mon. 121, a residue "to be divided equally among my *children*," "each *heir*" to account for advancements to him; *Scott v. Moore*, 1 Winst. Eq. 98; *Smith v. Smith*, 2 Desaus. 123, note; *Utz's Estate*, 43 Cal. 201, (under statute providing for remedy in case of omission of children of deceased child, unless it appear that such omission was intentional.) So where there are grandchildren living and no children, *Berry v. Berry*, 3 Giff. 134, 9 W. R. 889 (1861.)

So where a life estate was given to testator's children, with remainder to their children, and, on death of any without issue, his share to testator's "surviving *child or children*," the child of a deceased child taking a share in this last remainder, *Church v. Tyacke*, 28 W. R. 91.

(d) 4 Ves. 698. See also his judgment in *Royle v. Hamilton*, 4 Ves. 439.

(e) *Radcliffe v. Buckley*, 10 Ves. 198; [*Moor v. Raisbeck*, 12 Sim. 123.]

(f) *Earl of Orford v. Churchill*, 3 Ves. & B. 59.

[(g) This knowledge must be proved; it cannot be presumed, per Lord Cranworth, *Crook v. Whitley*, 7 D., M. & G. 496.]

only, (h) it is not denied, that a strong argument in favor of such a doctrine might be drawn from cases, in which words have been carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used, (i) in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object. [Such were the circumstances and such the decision in *Fenn v. Death*.] (k) But this reasoning does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming in *esse*; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine in question to such a case, is to allow the construction to be influenced by subsequent circumstances, in *opposition to a well-known rule. Besides, it denies to a testator the power of giving to children, to the exclusion of descendants of another generation, (which is certainly a possible intention,) without using words of exclusion, though he might reasonably suppose the intention to exclude them was sufficiently apparent by the mention of another class of objects, and not of them. In the case of a gift to A, and, after his death, to his children living at his decease, and if he dies without leaving children, to B and his children; the testator may choose to prefer A and his children to B and his children; but it does not follow that he intends the same preference to extend to the *grandchildren* of A. (l)

Extended construction is confined to such cases;

(h) Which, as before suggested, occurred in respect of one class of children, in *Radcliffe v. Buckley*. The case of Lord Woodhouselee *v. Dalrymple*, 2 Mer. 419, stated next chapter, would probably be considered as aiding the argument for an extension of the bequest to grandchildren *in such case*.

(i) *Day v. Trig*, 1 P. W. 286, *ante* Vol. I., p. *377; *Doe d. Humphreys v. Roberts*, 5 B. & Ald. 407, *ante* Vol. I., p. *794; [*Gill v. Shelley*, 2 R. & My. 336.

(k) 23 Beav. 73. See also *Berry v. Berry*, 3 Gif. 134. In general, if the word children extends beyond its primary meaning, it will include issue of every degree. See per Turner, L. J., *Pride v. Fooks*, 3 De G. & J. 275, and per Lord Cranworth, *Crook v. Whitley*, 7 D., M.

& G. 496. In *Fenn v. Death*, great-grandchildren appear to have been excluded; *sed qu.*

(l) In *Loveday v. Hopkins*, Amb. 273, Sir T. Clarke, M. R., held that grandchildren were not entitled under a bequest to "heirs," because the term appeared by the context of the will to be used in the sense of children. Sir E. Sugden has shown, (Pow., 8th ed., 664,) that a power to appoint among children cannot be exercised in favor of grandchildren. He does not advert to any distinction in the case of there being no children. According to the doctrine which the present writer has endeavored to refute, such a power would *in that event* extend to grandchildren.

[In *Pride v. Fooks*, (m) where a testator bequeathed his residuary estate in trust for "such child or children as his niece and two nephews, A, B and C should leave at their respective deceases," one-third to the "child or children" of A, and the two other thirds to the "child or children" of B and C, in like manner; with cross executory limitations in case the niece or either of the nephews should die without leaving any "children or child," to the "children or child" of the other or others "leaving children or a child;" and in case all of them, his said nephews and nieces, should die without leaving "any issue" lawfully begotten, the testator directed the whole of the residue to be divided between the three "children" of X equally, or in case of either of them being then dead, to the survivors or survivor and the "issue" of such as might be dead, such "issue" taking *per stirpes* and not *per capita*. The nephews and niece survived the testator, and died without leaving any children living at their respective deceases, but the niece left several grandchildren and one great-grandchild, and it was contended, that, there being in event no children, the bequest to "children" must be extended to remoter issue: but it was held by K. Bruce and Turner, L. JJ., that the construction of the will could not thus be made dependent on subsequent events. This being so, and the case not being one in which the gift over without issue *could be read "without such issue," (n) the residue was undisposed of.

And even where, according to the state of facts at the date of the will, the gift could never have taken effect in favor of children, the context may be such as to exclude remoter issue. Thus, in *Loring v. Thomas*, (o) where a testatrix bequeathed one part of her residue to the *children* of her deceased aunt A, and another part to the *grandchildren* of her deceased aunt B, and added a proviso giving certain directions in case the *children* of A or the *grandchildren* of B should die in her lifetime: there was no child of A living at the date of the will, but there were grandchildren, who claimed the part given to the children of A. Sir R. Kindersley, V. C., held that they were not entitled. He observed that it was said the testatrix must have used the word "children" inadvertently, and meant grandchildren. That must mean either that she intended to have written grandchildren, or that she used the word "children" as

— may be excluded, even from such cases, by context.

[(m) 3 De G. & J. 252.

(n) As to this, *vide post* ch. XL., § 2.

(o) 1 Dr. & Sm. 497, 508. See also

Stephenson v. Abingdon, 31 Beav. 305, stated *post* p. *153.

co-extensive with it. But this could not be maintained, since not only there, but in the proviso, he found that she clearly knew the distinction between children and grandchildren: she made the very distinction. (p)

The word "grandchildren" must, on the same principle, be confined to the single line or generation of issue, which it naturally imports. Lord Northington, indeed,] in *Hussey v. Berkeley*, (q) expressed an opinion that the word *grandchildren* would, without further explanation, comprehend great-grandchildren; the term being, he thought, in common parlance used rather in opposition to children, than as confined to the next generation. But, in the case before his lordship, the testator had explained this to be his construction, by applying in another part of his will the term "grandchild" to a great-grandchild. (r) And the contrary of Lord Northington's doctrine was determined by Sir W. Grant, in *Earl of Orford v. Churchill*, (s) in which, however, it is remarkable, that neither his lordship's *dictum* nor decision was noticed. 2

Whether "grandchildren" includes great-grandchildren.

It should be observed, however, that, in a considerable class of *cases, (t) the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as *nomen collectivum*, or as synonymous with *issue* or *descendants*; 3 in which general sense it has often the

"Children" when synonymous with issue.

(p) The V. C. added, "a third alternative construction would be that she thought the grandchildren really were children: but that would be inconsistent with the evidence which proved that she was acquainted with the state of the family."]

(q) 2 Ed. 194, Amb. 603 (*Hussey v. Dillon*.)

[(r) But as to this see pp. *151, *152.]

(s) 3 Ves. & B. 59.

2. In *Yeates v. Gill*, 9 B. Mon. 204, *grandchildren* were held not to include great-grandchildren unless such intention plainly appear in the will. And the same rule was followed in *Dooling v. Hobbs*, 5 Harring. 405, in which the devise was to grandsons by name, with a limitation over "to descend to the surviving ones," if any die without issue. But in *Pemberton v.*

Parke, 5 Binn. 601, a gift, after death of testator's widow, to the "children and grandchildren of A, who may be then living" was held to include great-grandchildren.

(t) *Vide post* ch. XXXVIII.: [and In re *Crawhall's Trusts*, 8 D., M. & G. 480 (gift "to the children of my sister A. (except the issue of her daughter X.) and of my sister B.," held to include grandchildren of B.)]

3. Where "*children*" is used as a word of limitation, as, to A and her children, it is generally construed to be synonymous with *issue* or *descendants*, *Parkman v. Bowdoin*, 1 Sumn. C. C. 359; *Haldeman v. Haldeman*, 40 Penna. St. 29; *Merryman v. Merryman*, 5 Munf. 440. And the same construction has been adopted in other cases, where it was held to be a word of

effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context. But even if the fact were otherwise, those cases would afford no authority for extending the word "children" to grandchildren in the cases under consideration. *There* it was synonymous with issue in *all* events; *here* it is to be so construed only in *certain* events, leaving the signification of the word, therefore, dependent on circumstances arising subsequently to the making of the will, or, it may be, to the death of the testator. The cases, therefore, are not analogous.

[Under a gift to the children of a person, his children by different marriages will generally be entitled; ⁴ and it is not necessary to show that the testator had in view a future marriage, but only that the terms of the will are not so wholly inconsistent with such a notion as necessarily to limit the generality of the word children, (u) in which latter case effect will of course be given to the testator's language. (x) In a case of *Stavers v. Barnard*, (y) where a testator bequeathed his personal estate to trustees, in trust to apply the interest thereof "in the maintenance of his children until the youngest attained twenty-one, and then to divide the same equally between A, B, C and D, children by his former wife, and E and F, children by his then present wife, and such other child or children as might be living, or as his said wife might be *enciente* with at his decease." Sir J. Bruce, V. C., held that two children by the first marriage, not named in the will, but living at the date of the will and of the testator's death, were not entitled under the latter words of the bequest.]

It remains to be observed that a gift to children does not extend to purchase. *Prowitt v. Rodman*, 37 N. Y. 42, being a remainder to the "children of A" after a life estate to B; *Dunlap v. Shreve*, 2 Duv. 335, a gift to children of A; *Jordan v. Roach*, 3 Geo. (Miss.) 481, a "reversion" to testator's "other children and their heirs" on death of any one without issue; but, *contra*, *Tucker v. Stites*, 10 Geo. (Miss.) 196, where a remainder was limited to the surviving children of A, after a life estate to A; and to same effect see *Ellet v. Paxson*, 2 Watts & S. 418; see also *Guthrie's Appeal*, 37 Penna. St. 9, where it was said, in a like case, that "children," "heirs" and "heirs of body" might be interchanged as the testator's intention seemed to require.

4. See *Theobald on Wills* 138; 2 Redf. on Wills 30; *Carroll v. Carroll*, 20 Tex. 731.

[(u) *Barrington v. Tristram*, 6 Ves. 345; *Critchett v. Taynton*, 1 R. & My. 541; *Peppin v. Bickford*, 3 Ves. 570; *Ex parte Ilchester*, 7 Ves. 368; *In re Pick-up's Trusts*, 1 J. & H. 389; *Isaac v. Hughes*, L. R., 9 Eq. 191.

(x) *Stopford v. Chaworth*, 8 Beav. 331.

(y) 2 Y. & C. C. C. 539: and see *Lovejoy v. Crafter*, 35 Beav. 149.]

children by affinity;⁵ consequently a grandson's widow has been held not to be entitled under a devise to grandchildren. (z)

Children by affinity not included.

*Gifts to other classes of relations, as nephews, nieces, cousins, are subject to like rules.⁶ Thus great-nephews and great-nieces are not included in a gift to "nephews and nieces," (a) nor a great grand-nephew in a gift to "grand

"Nephews," "first cousins," &c., do not include great nephews or second cousins.

5. And a residuary gift to be divided among my "nephews and nieces of every description mentioned in this will" is no exception to this rule, though a niece by marriage had been mentioned in the will as a niece, but includes only whole blood and half blood, and neither a great-niece nor a niece by marriage, *Lewis v. Fisher*, 2 Yea. 196; so, too, a gift to "all my nephews and nieces," *Green's Appeal*, 42 Penna. St. 25; so, too, a residuary gift to "all my nephews and nieces" does not include a niece of testator's husband, although in another part of the will a legacy is given to her as "my niece A," in which case *Sir Geo. Jessel, M. R.*, expresses disapproval of the case of *Grant v. Grant* cited below, *Wells v. Wells*, 18 L. R., Eq. 504 (1874.) In many cases, however, circumstances have made exceptions to this rule—sometimes by reason of the context of the will—and sometimes by outward relations making the testator's intention clear. Among these is the case of *Frogley v. Phillips* (cited in note i,) and more lately affirmed on appeal, 30 Beav. 162—3 De G., F. & J. 466; so *Grant v. Grant*, 18 W. R. 230—5 L. R., C. P. 380, above mentioned, in which the devise was to "my nephew Joseph Grant," and the testator and his wife each had a nephew of that name, the former of whom the testator had slight knowledge of, but the latter lived in his house, was called "nephew" by him, and was allowed to take upon evidence showing that to be testator's intention. This case, as above stated, has been since disapproved by

Jessel, M. R.; in *Hogg v. Cook*, 32 Beav. 641 (1863), the testator had no nephews of his own, and in *Sherratt v. Mountford*, 15 L. R., Eq. 305, affirmed 8 L. R., Ch. App. 928 (1873) he neither had nephews and nieces of his own, nor brother or sister living, and in both cases the wife's nephews and nieces were held to be intended; so, too, *Adney v. Greatrex*, 17 W. R. 637 (1869), where the gift of residue was to testator's nephews and nieces, there being but one, and no possibility of more, and the gift being preceded by a gift to that nephew, a great-nephew and his wife's nephews and nieces, by name, all designated as nephews and nieces. The same principle as to the exclusion of relations by affinity applies to *step-children*, who are not included in a gift to children, *Barnes v. Grenzsbach*, 1 Edw. Ch. 41, although there were gifts to testator's children and step-daughter by name, with remainder over on the death of "any of my said children or step-daughter without issue—to the survivors of said children;" so, too, *Hallet, Re*, 8 Paige Ch. 375; *Cutter v. Doughty*, 23 Wend. 513; *Lawrence v. Hebbard*, 1 Bradf. 252; *Fouke v. Kemp*, 5 Harr. & J. 135; *Sydnor v. Palmer*, 29 Wis. 226. Neither will the word "children" embrace a child adopted under a statute providing for such adoption, *Schafer v. Eneu*, 54 Penna. St. 304.

(z) *Hussey v. Berkeley*, 2 Ed. 194.

6. It has been held in *Lewis v. Fisher*, 2 Yea. 196, that under a gift to "nephews and nieces of every description mentioned in this will," great-nephews and great-

(a) *Shelley v. Bryer*, Jac. 207; *Falkner v. Butler*, Amb. 514.

nephews." (b) So descendants of first cousins will not take under a gift to "first cousins or cousins german;" (c) nor a first cousin once removed under a gift to second cousins. (d) And "cousins" *prima facie* means first cousins. (e) Again, relations by affinity do not, without the aid of a context, (f) take under a gift to "relations" generally, (g) or to relations of a particular denomination, as nephews and nieces. (h) And a gift to nephews or nieces will not include all great-nephews or great-nieces, (i) or all nephews or nieces by marriage, (k) merely because in another part of the will the testator has misdescribed one or more of them as a nephew or niece. Generally, indeed, it will not include even the individuals thus misdescribed. (l)

But the intention of a testator to use any of these appellations in a less accurate sense will of course prevail, if clearly indicated by the context. Thus, in *James v. Smith*, (m) where a testator, after describing a great-niece as his "niece A, daughter of his nephew B," bequeathed his residue to his nephews and nieces, Sir L. Shadwell, V. C., held that the testator had unequivocally shown that he meant the child of a nephew or niece to take, as well as a nephew or a niece, and that not only A but all others in the same degree were entitled to share. He distinguished *Shelley v. Bryer*: "There the testator spoke of a person as his niece who in

nieces are not included, though spoken of as nephews and nieces in the will; see also *Wms. Ex'rs* (6th Am. ed.) 1188-90; 2 Redf. on Wills 23; O'Hara on Int. of Wills §10; Hawkins on Wills 85; Flood on Wills 544; *Van Gieson v. Howard*, 3 Halst. Ch. 462. But, *contra*, see *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Bowers v. Brower*, 9 N. Y. Leg. Obs. 196. So where a gift was to several by name, testator calling them his nephews and nieces, although he had but one nephew and one niece, and the others were great-nephews and great-nieces, all will be included in a subsequent residuary gift to nephews and nieces, *Adney v. Greatrex*, 17 W. R. 637 (1869.)

(b) *Waring v. Lee*, 8 Beav. 247.

(c) *Sanderson v. Bayley*, 4 My. & C. 56.

(d) *Corporation of Bridgnorth v. Collins*, 15 Sim. 541.

(e) *Stoddart v. Nelson*, 6 D., M. & G.

68; *Stephenson v. Abingdon*, 31 Beav. 305; overruling contrary dictum of Shadwell, V. C., *Caldecott v. Harrison*, 9 Sim. 457.

(f) *Vide ante* p. *124.

(g) *Hibbert v. Hibbert*, L. R., 15 Eq. 372.

(h) *Wells v. Wells*, L. R., 18 Eq. 504. *Grant v. Grant*, L. R., 5 C. P. 380, 727, 2 P. & D. 8, *contra*, is opposed to the general current of authority.

(i) *Shelley v. Bryer*, Jac. 207; *Thompson v. Robinson*, 27 Beav. 486. See also *In re Blower's Trusts*, L. R., 6 Ch. 351, reversing S. C., L. R., 11 Eq. 97; *In re Standley's Estate*, L. R., 5 Eq. 303.

(k) *Smith v. Lidiard*, 3 K. & J. 252; *Wells v. Wells*, L. R., 18 Eq. 504.

(l) See cases in last two notes, and *Hibbert v. Hibbert*, L. R., 15 Eq. 372.

(m) 14 Sim. 214.

fact was his great-niece, but he did not show that he knew her to be the child of a nephew or niece; he spoke at random." It may be doubted, however, whether the judges who decided *Smith v. Lidiard* and *Thompson v. Robinson* would accept inadvertence as a sufficient distinction between those cases and *James v. Smith*. Again, in *Weeds v. *Bristow*, (*n*) where by his will a testator bequeathed his residue equally amongst his nephews and nieces; and by codicil he gave to his "nephew A," (who was in fact a great-nephew,) £100 which he declared was to be in addition to the share of residue given to him by the will—(thus far like *Shelley v. Bryer*)—and that he was to receive first the £100, and afterwards, in addition thereto, the said share of residue; it was held by Sir J. Stuart, V. C., that the testator had put his own construction on his language, and that not only A, but all other great-nephews and great-nieces were let in. As to A, the concluding passage of the codicil constituted of itself a gift to A; for of course a gift to an individual otherwise sufficiently described is not invalidated by a mis-statement of his relationship; (*o*) but as to the others, the case goes beyond *James v. Smith*; for there the testator used the word "niece" of "the daughter of a nephew;" here he used it only of "A."

So if at the date of the will there is not, and it is impossible there ever should be, a nephew or niece, properly so called, and the testator knows the fact, the nephew or niece of a husband (*p*) or wife (*q*) may be entitled. So if the gift be to "nephews and nieces" (in the plural,) and there is not and cannot be more than one nephew and one niece, nephews and nieces by marriage may take. (*r*) And under corresponding circumstances first cousins once removed may take under a gift to "second cousins." (*s*) But in these cases it must be proved that the testator knew the facts, (*t*)

And the larger construction may after all be excluded by the context; as in *Stephenson v. Abingdon*, (*u*) where by will the bequest was to "my cousins living at my death and the children of my cousins

(*n*) L. R., 2 Eq. 333.

(*o*) *Stringer v. Gardiner*, 4 De G. & J. 468.

(*p*) *Sherratt v. Mountford*, L. R., 8 Ch. 928.

(*q*) *Hogg v. Clark*, 32 Beav. 641; *Sherratt v. Mountford*, L. R., 8 Ch. 928.

(*r*) *Adney v. Greatrex*, 38 L. J., Ch.

414. It was assumed that a woman aged 60 was past child-bearing.

(*s*) *Slade v. Fooks*, 9 Sim. 386. It is presumed that the state of facts found was that which existed at the date of the will.

(*t*) *Crook v. Whitley*, 7 D., M. & G. 490.

(*u*) 31 Beav. 305.

then dead," and by codicil the testator excluded from the bequest the only four persons who then were or could ever become his "cousins," it was nevertheless held that the children of those cousins, *i. e.*, first cousins once removed, could not take, for the testator had by expressly mentioning children of deceased cousins provided for such first cousins once removed as he meant to include.

*Conversely, the full force of any term of relationship may be so limited by the context as to exclude some of those who would naturally be included in the class. (*x*) And it is to be observed that a bequest to "first and second cousins" has been decided to comprehend all who are within the same degree (the sixth) as second cousins; and therefore to admit great-nieces and first cousins once, (*y*) or twice (*z*) removed.]

Full meaning curtailed.

Gift to "first and second cousins."

Again, a gift to brothers and sisters extends to half brothers and sisters, (*a*) [and a gift to nephews and nieces to the children of half brothers and sisters: (*b*) and so with regard to every other degree of relationship.]⁷

A gift to a class of relations includes those of the half-blood.

II.—But the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or in other words, as to the period within which the objects must be born and existent; supposing the testator himself not to have expressly fixed the period of ascertaining the objects, which, of course, takes the case out of the general rule; for example, a gift to children "now living," applies to such as are in existence at the date of the will, (*c*) and those only; and a gift to children living at the decease of A will extend to children existing at the prescribed period, whether the event happens in the

As to class of children entitled.

(*x*) *Caldecott v. Harrison*, 9 Sim. 457, where the V. C. held that "cousins" was restricted by the context to first cousins. The principle is of course clear, though the V. C.'s construction of "cousins" has not been followed, *sup.*

(*y*) *Mayott v. Mayott*, 2 B. C. C. 125.

(*z*) *Silcox v. Bell*, 1 S. & St. 301; *Charge v. Goodyer*, 3 Russ. 140.]

(*a*) The point was adverted to, *arguendo*, in *Leake v. Robinson*, 2 Mer. 363, which did not require its determination.

(*b*) *Grievess v. Rawley*, 10 Hare 63.]

7. See *Wms. Ex'rs* (6th Am. ed.) 1188; 2 Redf. on Wills 30; *Theobald on Wills* 153; *Hawkins on Wills* 86; *Shull v. Johnson*, 2 Jones Eq. 202; *Luce v. Harris*, 79 Pa. 432; *Lewis v. Fisher*, 2 Yea. 196, where the gift was to nephews and nieces "of every description."

(*c*) *James v. Richardson*, 1 Vent. 334, 2 Vent. 311; *Burchet v. Durdant*, T. Raym. 330. See also *Att.-Gen. v. Bury*, 1 Eq. Cas. Ab. 201; *Crosley v. Clare*, 3 Sw. 320, n.; *Abney v. Miller*, 2 Atk. 593; *Blundell v. Dunn*, 1 Mad. 433.

testator's lifetime (supposing that they survive him,) or after his decease. (d) [These, however, are still gifts to classes, and if any of the children **"now living,"* or *"living at the death of A."* (supposing A to die before the testator,) should die in the testator's lifetime, the share which such child would have taken will not lapse, but the surviving children will take the whole. Classes fluctuate both by diminution and by increase: here it would be by diminution only. (d) But if the testator after a gift to *"children,"* proceeds to name them, (e) or if he specifies their number, as by giving *"to the five children of A,"* (f) this is a *designatio personarum*, and is a bequest to those who are named, or to the five in existence at the date of the will, and the shares of any who die before the testator lapse. So, where the bequest was to the testator's brothers and sister and his wife's brothers and sister, the testator and his wife each having one sister at the date of the will, (g) and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three

Gift to children of A living at the death of B.—(d) *Allan v. Callow*, 3 Ves. 289; [*Turner v. Hudson*, 10 Beav. 222.] Where a testator gave a legacy to A, his daughter for life, and after her death to his grandson B; and if he should die in the lifetime of A, then to the children of C, who should be then living; it was held that the bequest was confined to the children of C living at the death of A, and that the point was so clear, that the costs of the suit occasioned by the refusal of the executor to pay the legacy without the opinion of the court, must fall on himself, *Harvey v. Harvey*, 3 Jur. 949. [See further as to *"then living,"* ante Vol. I., p. *851, n.] And here it may not be amiss to observe, that a child who is made a legatee for life is not thereby incapacitated from claiming under a bequest of the ulterior interest to the testator's children living at his (the testator's) decease, *Jennings v. Newman*, 10 Sim. 219. [See also *Almack v. Horn*, 1 H. & M. 630; and see *Woods v. Townley*, 11 Hare 314; *Carver v. Burgess*, 18 Beav. 541, 7 D., M. & G. 97; *Reay v. Rawlinson*, 29 Beav. 88.]

(d) *Lee v. Pain*, 4 Hare 250; *Leigh v.*

Leigh, 17 Beav. 605; *Cruse v. Howell*, 4 Drew. 215. See also *Viner v. Francis*, 2 Cox 190; *Dimond v. Bostock*, L. R., 10 Ch. 358. See further as to gifts to a class, Vol. I., pp. *269, *341. The head-note to *Spencer v. Wilson*, L. R., 16 Eq. 501, erroneously states that in that case *Leigh v. Leigh* was not *"followed."* The two cases were very different, as pointed out in the latter by *Malins, V. C.*, who in *In re Smith's Trusts*, 9 Ch. D. 119, cited *Leigh v. Leigh* as an authority.

(e) *Bain v. Lescher*, 11 Sim. 397. And see *Burrell v. Baskerfield*, 11 Beav. 525; *In re Hull's Estate*, 21 Beav. 314; *Spencer v. Wilson*, L. R., 16 Eq. 501. But a gift to several children, *nominatim* in one part of the will, does not confine the generality of a bequest to *"children,"* in another part, *Moffat v. Burnie*, 18 Beav. 211. See also *Fullford v. Fullford*, 16 Beav. 565; *Fitzroy v. Duke of Richmond*, 27 Id. 186. Cf. *White v. Wakley*, 26 Id. 23.

(f) *In re Smith's Trusts*, 9 Ch. D. 117.

(g) *Haverгал v. Harrison*, 7 Beav. 49. And see *Hall v. Robertson*, 4 D., M. & G. 781.

other children at the date of the will, it was held that the terms "children," "brothers," &c., were to be understood as confined to those living at the date of the will.] (*h*)

The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

II. 1.—An immediate gift to children (*i. e.*, a gift to take effect in

possession immediately on the testator's decease,) whether it be to the children of a living (*i*) or a deceased person, (*k*) and whether to children simply or to all the children, (*l*) and whether *there be a gift over in case of the decease of any of the children under age or not, (*m*) comprehends *the children living at the testator's death (if any)*, and those only; ⁸ notwithstanding some of the

(*h*) *Leach v. Leach*, 2 Y. & C. C. C. 495. See also *Ramsay v. Sheldermine*, L. R., 1 Eq. 129, and *qu.* Cf. *Goodfellow v. Goodfellow*, 18 Beav. 356; *In re Stanhope's Trusts*, 27 Id. 201.]

(*i*) 2 Vern. 105; 1 Eq. Cas. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545; 1 Ves. 209; 2 Ves. 83; Amb. 273; Id. 348; 1 B. C. C. 532, n.; Id. 529; 1 Cox 68; 2 Cox 190; 2 B. C. C. 658; 3 B. C. C. 352; Id. 391; 14 Ves. 576.

(*k*) *Viner v. Francis*, 2 Cox 190.

(*l*) *Heathe v. Heathe*, 2 Atk. 121; *Singleton v. Gilbert*, 1 B. C. C. 542, n., 1 Cox 68; *Scott v. Harwood*, 5 Mad. 332.

(*m*) *Davidson v. Dallas*, 14 Ves. 576; [*Scott v. Harwood*, 5 Mad. 332.] But as the gift over necessarily suspends the distribution as to all until the eldest attains twenty-one, [as to which, however, see *Fawkes v. Gray*, 18 Ves. 131,] ought not the children born in the interval to have been let in, seeing that these rules always aim at including as many objects as possible?

8. *Yeaton v. Roberts*, 28 N. H. 459; *Gardiner v. Guiler*, 106 Mass. 25; *Rogers v. Mutch*, 2 N. J. L. J. (Ch. Div.) 214; *Merriam v. Simonds*, 121 Mass. 198; *Stires v. Van Rensselaer*, 2 Bradf. 172; *Jenkins v. Freyer*, 4 Paige Ch. 47; *Lorillard v.*

Coster, 5 Paige Ch. 172; *Mowat v. Carow*, 7 Paige Ch. 339; *Tucker v. Bishop*, 16 N. Y. 402; *Downing v. Marshall*, 23 N. Y. 373; *Post v. Herbert*, 12 C. E. Gr (N. J.) 540; *Gross' Estate*, 10 Penna. St. 361, exclusive of children of a child deceased before testator; *Peale's Estate*, 32 Leg. Int. (Pa.) 374; *Ingram v. Girard*, 1 Houst. 286, where the gift was to grandchildren "that may be born" between the making of the will and the testator's death, and those born after his death were excluded; *State v. Raughley*, 1 Houst. 561; *Lockerman v. McBlair*, 6 Gill 177; *Chase v. Lockerman*, 11 Gill & J. 185; *Young v. Robinson*, 11 Gill & J. 328; *Benson v. Wright*, 4 Md. Ch. 279; *Shotts v. Poe*, 47 Md. 519; but otherwise where the children are named, those living at testator's death only taking their portion in that case, and the portion of those deceased before testator lapsing; *Brewer v. Opie*, 1 Call 184; *Pendleton v. Hoomes*, Wythe (Va.) 94; *Threadgill v. Ingram*, 1 Ired. L. 577; *Petway v. Powell*, 2 Dev. & Bat. Eq. 308; *Pickett v. Southerland*, 1 Winst. Eq. 67, where a gift to "children that A now has or may hereafter have," embraced those living at testator's death and those born after; *Henderson v. Womack*, 6 Ired. Eq. 441; *Shinn v. Motley*, 3 Jones

early cases, which make the date of the will the period of ascertaining the objects. (n) 9

It is scarcely necessary to observe, that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, &c., though cases to the contrary are to be found, especially at an early

Eq. 490, where a gift to all their children which now are or hereafter may be, was held to embrace after-born children as well as those living at testator's death; *Whitehead v. Lassiter*, 4 Jones Eq. 79; *Britton v. Miller*, 63 N. C. 270; *Ballard v. Conners*, 10 Rich. Eq. 389, where the testator's direction was to divide after sale "among my surviving children," and it was held that they should be ascertained at testator's death and not at the time of division; *Myers v. Myers*, 2 McCord Ch. 256; *Wood v. McGuire*, 15 Ga. 202; *Springer v. Congleton*, 30 Ga. 977, where it was held that they took as a class at testator's death, under a gift to be divided between my brother's children by name. Here one died before the testator, and the survivors took the whole, *Stephens, J.*, saying that "the description by enumeration was subordinate to the general description;" *Ballard v. Conners*, 10 Rich. Eq. 389; *Conley v. Kincaid*, 1 Wins. Eq. 44; *Cessna v. Cessna*, 4 Bush 516. And this is true in general of gifts to a class, *Schaffer v. Kettel*, 14 Allen 528; *John's Estate*, 33 Leg. Int. 256; *Jackson v. Roberts*, 14 Gray 546; *Harris v. Tichenor*, 1 Stew. Eq. 328; *Hart v. Hart*, 2 Desaus. 57. See, too, *Hoppock v. Tucker*, 59 N. Y. 202; *Magaw v. Field*, 48 Id. 668. In *Harris v. Alderson*, 4 Sneed (Tenn.) 254, the "children that A now has or may have," were ascertained at testator's death, subject to open for any afterwards born. See, too, *Loring v. Thomas*, 2 Dr. & Sm. 497, where children of a child deceased before the date of the will were allowed to take under a gift to the children of A, and if any should die leaving issue, to such issue; *Aspinall v. Duckworth*, 35 Beav. 307 (1866); *Holland v. Wood*, 11 L. R., Eq.

91 (1872); *Fell v. Biddolph*, 10 L. R., C. P. 701 (1875); *Dimond v. Bostock*, 23 W. R. 554; 10 L. R., Ch. App. 358 (1875); *Coleman, Re*, 4 L. R., Ch. Div. 165 (1876); *Speakman, Re*, 4 L. R., Ch. Div. 620 (1876); *Coleman v. Jarrom*, 25 W. R. 137, 35 L. T. R. (N. S.) 614 (1876.) See also *Wms. Ex'rs* (6th Am. ed.) 1171; *Hawkins on Wills* 68; *Theobald on Wills* 142; 2 Redf. on Wills 10; *O'Hara on Int. of Wills* 289. And a gift to *unmarried daughters* means unmarried at testator's death, *Blagrove v. Coore*, 27 Beav. 138. In the case of *Emerson v. Cutler*, 14 Pick. 108, a residuary gift to testator's children, "to be distributed as they respectively arrive at the age of 21," was held to vest at testator's death; so in *Meyer v. Eisler*, 29 Md. 28, a gift at the end of twenty years, or when the youngest child should be twenty-one.

(n) See *Northey v. Strange*, 1 P. W. 341; S. C., *nom. Northey v. Burbage*, *Gilb. Rep.*, Eq. 136, Pre. Ch. 470.

9. See *Wms. Ex'rs* (6th Am. ed.) 1171; *Whitehead v. Lassiter*, 4 Jones Eq. 79, in which case a gift to "all my children that are now living" was held to embrace children of a child who died after the execution of the will, but not of one who died before; so, too, in *Morse v. Mason*, 11 Allen 36, where the devise was to "the surviving children of A, not knowing all their names," and it was held that the class should be ascertained at the date of the will; so in *Habergham v. Ridehalgh*, 9 L. R., Eq. 395 (1870), a gift to brothers and sisters for life, and remainder on the survivor's death to the "children of my said brothers and sisters," included all living at the date of the will, and the children of all who died after that time.

period. As in *Cook v. Cook*, (o) where, under an immediate devise (i. e., a devise in possession) to the *issue* of J. S. (which was held to apply to the children and grandchildren,) a son born after the death of the testator was allowed to participate.

II. 2.—Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. (p) ¹⁰ Thus in the case of a devise or bequest to A for life, and after his decease to his children, or (which is a better illustration of the limits of the rule, since, in the case suggested, the parent being the legatee for life, all the children who can ever be born necessarily come *in esse* during the preceding interest) to A for life, and after his decease to the children of B, the children (if any) of B living at the death of the testator, together with those who happen to be born during the life of A, the tenant for life, are entitled, but not those who may come into existence after the death of A. (q) ¹¹ [And a gift

(o) 2 Vern. 545.

(p) 9 Mod. 104; 1 Atk. 509; 2 Atk. 329; Amb. 334; 1 Ves. 111; 1 Cox 327; Cowp. 309; 1 B. C. C. 537, 542; [3 B. C. C. 352, 434;] 5 Ves. 136; 8 Ves. 375; 15 Ves. 122; 10 East 503; 1 Mer. 654; 2 Mer. 363; 1 Ba. & Be. 449; 3 Dow 61; [5 Beav. 45.]

10. Wms. Ex'rs (6th Am. ed.) 1172; Theobald on Wills 142; Hawkins on Wills 71; 2 Redf. on Wills 11; O'Hara on Int. of Wills 239. Most of the cases where a future period of distribution is fixed upon will be found to be limitations over after an estate for life; more fully considered in note 11, below. The rule laid down in the text holds good, however, in cases where the period is determined by some other event. See *Fosdick v. Fosdick*, 6 Allen 43; *Meares v. Meares*, 4 Ired. L. 196, date fixed for distribution among children "then living;" *Oswald v. Givins*, Rich. Eq. Cas. 326; *People v. Jennings*, 44 Ill. 488; *Faulding's Trusts*,

26 Beav. 263; *Hilliard v. Fulford*, 28 L. T. R. (N. S.) 892 (1873.) See, too, *Ballard v. Ballard*, 18 Pick. 41, where a gift to sons after ten years vested in all living at testator's death, to open for all born afterwards prior to the time of division; so, too, *Bailey v. Wagner*, 2 Strobb. Eq. 1; see, too, *Meyer v. Eisler*, 29 Md. 28; *Hawley v. James*, 5 Paige Ch. 320.

(q) *Ayton v. Ayton*, 1 Cox 327.

11. This principle is supported by the majority of American cases, and is believed to be the rule followed in most, if not all, of them, notwithstanding some contradictory decisions. These last rest in many cases, as will appear, on language in the will which was considered to be evidence of a different intention. The following cases uphold the rule laid down in the text: *Shattuck v. Stedman*, 2 Pick. 467, where the legacy was made payable at the age of twenty-one, and children reaching that age and surviving testator, but dying before life tenant, took vested

over in case of the decease of any of the children under age will not affect the construction.](*r*) The rule is the same where the life

remainders; *Winslow v. Goodwin*, 7 Metc. 381; *Parker v. Converse*, 5 Gray 336; *Moore v. Weaver*, 16 Gray 305; *Weston v. Foster*, 7 Metc. 297; *Torrey v. Shaw*, 3 Edw. Ch. 356; *Dingley v. Dingley*, 5 Mass. 535; *Bowditch v. Andrews*, 8 Allen 342; *Pike v. Stephenson*, 99 Mass. 188; *Worcester v. Worcester*, 101 Mass. 132 (in this case, however, the gift was held to be vested at testator's death in the children of A, B and C then living, and not to open and let in children born after testator's death in the lifetime of the life tenant, his widow); *Moore v. Dimond*, 5 R. I. 121; in *Denny v. Allen*, 1 Pick. 147, in a gift of both real and personal estate in remainder, the real estate followed the above rule, and the personal estate went to the children surviving the life tenant (the latter disposition was afterwards overruled in *Bowditch v. Andrews*, and in *Shattuck v. Stedman*, cited above); *Bull v. Bull*, 8 Conn. 49; *Hannan v. Osborn*, 4 Paige Ch. 336; *Van Vechten v. Pearson*, 5 Paige Ch. 512; *Nodine v. Greenfield*, 7 Paige Ch. 544 (where the gift was to wife for life, with remainder to A's children "who shall be living at the time of my wife's death," and the children of A took a vested remainder at testator's death, subject to be defeated if they died before the widow, and to open for after-born children); *Doe v. Provost*, 4 Johns. 61, where the gift was to A for life, with remainder to all such children as said A "should have begotten at the time of her death;" *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Williams v. Conrad*, 30 Barb. 524; *Tucker v. Bishop*, 16 N. Y. 402; *Teed v. Morton*, 60 N. Y. 506; *Stevenson v. Lesley*, 70 N. Y. 512; *Johnson v. Valentine*, 4 Sandf. 37; or to the children of A, to divide equally between them as they respectively come to the age of twenty-one years, in which case it was opened to let in a child born before that time, *Ward v. Tomkins*, 3 Stew. (N. J.) 73. See also, to like effect, *Den v. Manners*, Spenc. 142; *Van Gieson v. Howard*, 3 Halst. Ch. 462; *Jones v. Jones*, 2 Beas. 236; *Heater v. Van Auken*, 1 McCarter 159; *Feit v. Vanatta*, 6 C. E. Gr. (N. J.) 85; see, too, *Ross v. Adams*, 4 Dutcher 160, where a deed to A, and at her death to her children, (she having none at the date of the deed,) vested a remainder in them as they were born; *Minnig v. Batdorf*, 5 Penna. St. 503; *Herr's Estate*, 28 Penna. St. 467; *Bower's Estate*, 32 Leg. Int. (Pa.) 229; *Cote v. Von Bonnhorst*, 41 Penna. St. 243, where no children were born until after testator's death, and they took vested remainders as they were born; *Ross v. Drake*, 37 Penna. St. 375. The opinion of Justice Strong relating to this point is given below as a clear and correct statement of the law and its history: "The case then comes within the rule laid down in *Minnich v. Batdorf*, 5 Barr 503, that when land is given to a person for life, or for any other estate upon which a remainder may be dependent, and after the determination of that estate it is devised over, whether to per-

(*r*) *Berkeley v. Swinburne*, 16 Sim. 275, corresponding with *Davidson v. Dallas*, *sup.*; the gift over was treated as confirming the rule. But see *per cur.*, 13 Ch. D. 489, 491, 492. See also the order in *In re Smith*, 2 J. & H. 601, which favors a different rule, since in terms it admits all children born before the gift

over operated. The only point decided however was that no child born after its father's bankruptcy (upon which the prior estate ceased) was entitled; and as, in fact, no child was born between that event (1841) and the eldest son's majority (1848), the other point did not arise.]

*interest is not of the testator's own creation, but is anterior to his title; (s) [or where the prior estate determines by bankruptcy.] (t)

sons, *nominatim*, or to a class, it will vest in the objects to whom the description applied at the death of the testator. And if a particular estate is carved out with a gift over to the children of the person taking that interest or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. * * * Down to the time of the revolution, and for at least one hundred years, it was held in England, and so directed in many cases, that the period intended is that of the death of the testator, and the doctrine was applied indiscriminately to bequests of personalty and devises of realty. * * * Whether the reasons upon which this rule of construction was founded, were sound or not, is of little importance, after the long-continued adherence which the English courts gave to it. In regard to bequests of personalty, indeed, a departure was made from it by Sir John Leach in *Cripps v. Wolcott*, 4 Mad. 11, and he has been followed in a few other cases. In *Cripps v. Wolcott*, a testatrix bequeathed personal property to her husband for life, and directed that after her death it should be divided between her two sons and her daughter, and the survivor or survivors of them, share and share alike. One of the sons died after the testatrix, but in the lifetime of the husband. It was held that the other son and the daughter took

the whole legacy, the survivorship being referred to the death of the tenant for life, and not to the death of the testatrix. But the novel doctrine of Sir John Leach has not, even in England, been applied to the construction of devises of realty. *Edwards v. Simonds*, 6 Taunton 213, and *Doe ex dem. Long v. Prigg*, 8 B. & C. 231. In the last of these cases, decided in 1828, there was a devise to the testator's mother for life, then to his wife for life, and from and after decease of the mother and wife, to the surviving children of William Jennings and of John Warren and to their heirs, the rents and profits to be divided between them in equal proportions share and share alike. One of the children of Warren died after the testator, and before the death of the second tenant for life, leaving a son. It was held that the word 'surviving' referred to the testator's death, and not to that of the tenant for life. The deceased child of John Warren was therefore judged to have taken a vested interest, which descended to her son, as her heir-at-law. Such is the state of the law in England, on this subject. It has been regarded as unsettled, ever since the case of *Cripps v. Wolcott*. In Pennsylvania, the new doctrine asserted in that case has been distinctly repudiated, and the old rule established before our revolution has been recognized as law. Such was the ruling in *Johnston v. Morton*, 10 Barr 245, and a similar rule of construction

Same construction in case of an appointment.—(s) *Walker v. Shore*, 15 Ves. 122. [The same rules are applicable to an appointment under a power; and though the power authorizes an appointment to children living at the donee's death only, the court will not on that account, and to make the appointment fit on to the power, restrain the generality

of the expressions used, *Harvey v. Stracey*, 1 Drew. 73, 122. That appointments by will are generally to be construed in the same way as simple bequests, see *Oke v. Heath*, 1 Ves. 135; *Easum v. Appleford*, 5 My. & C. 56.

(t) In *re Smith*, 2 J. & H. 594; In *re Aylwin's Trusts*, L. R., 16 Eq. 590.]

In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares (*i. e.*, to their being divested *pro tanto*), as the number of objects

Children take vested shares, liable to be divested *pro tanto*.

was applied to a bequest of personalty in *Buckley v. Reed*, 3 Harris 85. It has at least these advantages: that it corresponds with the usual presumption in cases of doubt; that legacies and devises are vested, and that it prevents the disinheritance of a testator's descendants by the unanticipated death of their immediate ancestor, between the death of the testator and the time fixed for the distributive enjoyment. To this may be added, that it sometimes prevents the happening of an unforeseen intestacy." To the same effect are the following cases also: *Waters v. Waters*, 24 Md. 430; *Barnum v. Barnum*, 42 Md. 251; *Taylor v. Mosher*, 29 Md. 445; *Rowlett v. Rowlett*, 5 Leigh 20; *Hansford v. Elliot*, 9 Leigh 79; *Hamlett v. Hamlett*, 12 Leigh 350; *Martin v. Kirby*, 11 Gratt. 67; *Cooper v. Hepburn*, 15 Gratt. 558, where the gift was to A for life, and remainder to his children, and A was unmarried at the time of testator's death, but afterwards married and had children; *Brent v. Washington*, 18 Gratt. 526; *Stone v. Nicholson*, 27 Gratt. 1; *Taylor v. Bond*, 1 Busb. Eq. 25; *Conley v. Kincaid*, 1 Winst. Eq. 44; *Biddle v. Hoyt*, 1 Jones Eq. 334; *Carver v. Oakley*, 4 Jones Eq. 85, where the life tenant died before the testator; *Mason v. White*, 8 Jones L. 421; *Walker v. Johnston*, 70 N. C. 576; *Conner v. Johnson*, 2 Hill Eq. 41; *Drayton v. Drayton*, 1 Desaus. 324; *Bankhead v. Carlisle*, 1 Hill (S. C.) 357; *Bentley v. Long*, 1 Strobb. 43; *McGregor v. Toomer*, 2 Strobb. 51; *Crossby v. Smith*, 3 Rich. Eq. 244; *Wessenger v. Hunt*, 9 Rich. Eq. 459. *Burnside v. Wall*, 9 B. Mon. 321, in which case the real and personal property given were distinguished, the former following the rule above laid down, the latter going to the children who were living at the

termination of the life estate; *Arnold v. Arnold*, 11 B. Mon. 93; *Phillips v. Johnson*, 14 B. Mon. 172; *Bridgewater v. Gordon*, 2 Sneed (Tenn.) 5; *Alexander v. Walsh*, 3 Head 493; *McClung v. McMillan*, 1 Heisk. 655; *Nichols v. Denny*, 8 Geo. (Miss.) 59; *Rumsey v. Durham*, 5 Ind. 71. See, too, *Emmet v. Emmet*, 49 L. J., Ch. 21, 28 W. R. 401; *Clarke's Estate*, 3 De G., J. & S. 111; *Barnaby v. Tassell*, 11 L. R., Eq. 363 (1870.) In this last case the gift was in moieties, one moiety to testator's brothers and sisters for life, with remainder to their children and grandchildren; and the other moiety to his wife's "brother and brother's children and grandchildren in like manner," and at testator's death he had nephews and nieces, but no brothers or sisters living, some having died before, and some after, the date of the will, but all before testator; and the wife had one brother living, and had had two others, who died before testator. In this case all the nephews and nieces, on both sides, living at testator's death, and the children then living of such as had died before testator, were held to take vested remainders—as well the issue of the brothers and sisters who died before the testator's as of those who died after him.

In the following cases, where a different result was reached, note is made of all circumstances and language leading to a different conclusion: *Olney v. Hull*, 21 Pick. 311, "surviving;" *Howland v. Howland*, 11 Gray 469, a residuary gift "to A or her children or descendants," to be paid by the executor in his discretion, and not paid in A's lifetime, vested at her death in her children then living; *Thompson v. Ludington*, 104 Mass. 193, where the remainder was, at A's death, to such children "as shall be then living;" *Brown v. Wil-*

is augmented by future births, during the life of the tenant for life; and, consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissi-

liams, 5 R. I. 318, where the gift was, at A's decease, to the children of B, "or to the issue of deceased children as shall be living" at A's death, the children living at A's death excluding the issue of children then deceased: *Scott v. Guernsey*, 48 N. Y. 106, where the gift was a remainder, after A's death, to "her now surviving children or any of them that may be alive at her decease or the heirs of any that may be dead at the time of executing this my last will," the children living at her death, and the issue of children then deceased, both taking; *Hill v. Rockingham Bank*, 45 N. H. 270, the remainder, after life estate to A, being to testator's "*living children*;" *Holcombe v. Lake*, 4 Zab. 686, on A's death, without issue, to "my *surviving children*;" so, *Williams v. Chamberlain*, 2 Stockt. 373; so, too, *Van Tilburgh v. Hollinshead*, 1 McCart. 35, Green, C. J., saying: "The rule is that where an interest is given to one for life and after his death to his *surviving children*, those only can take who are alive at the time the distribution takes place;" so, too, *Slack v. Bird*, 8 C. E. Gr. (N. J.) 238; *Haskins v. Tate*, 25 Penna. St. 249, "to be equally divided amongst A's children, he and they enjoying the benefits of it whilst he lives," where A was held to take a life estate by implication, with remainder, at his death, to his children then living; *Carroll v. Hancock*, 3 Jones L. 471, which appears to be at variance with other North Carolina cases above cited; so, too, *Cole v. Crayon*, 1 Hill. Ch. 322, and *Crim v. Knotts*, 4 Rich. Eq. 340, appear to be at variance with the other South Carolina cases above cited.

In the following cases the gift was to *surviving children*: *Anderson v. Smoot*, *Speer* 312; *Schoppert v. Gillam*, 6 Rich. Eq. 83. *Swinton v. Legaré*, 2 McCord. Ch. 440. See also *Heard v. Brawner*, 28 Ga.

357; *Frierson v. Van Beuren*, 7 Yerg. 606; *Satterfield v. Mayes*, 11 Humph. 58; *Womack v. Smith*, 11 Humph. 478; *Tucker v. Stites*, 10 Geo. (Miss.) 196; *Sinton v. Boyd*, 19 Ohio St. 30; *Smith v. Block*, 29 Ohio St. 488, the last three cases being gifts to *surviving children*; and to the same effect is *Westbrook v. Romeyn*, *Baldw. C. C.* 196; and *Morton v. Morton*, 8 Barb. 18. This was also the result in *Emerson v. Cutler*, 14 Pick. 108, as to the personal property in a gift of both real and personal property to A, with remainder to her children. Shaw, C. J., makes a distinction here between the two kinds of property bequeathed, saying: "We think the rules applicable to the subject affecting real and personal estate are somewhat different. The principle is stated by Mr. C. J. Parsons in *Dingley v. Dingley*, 5 Mass. 537. After citing a similar clause in a will and the argument drawn from it, he says: 'This argument would have great weight in the devise of money or chattels for life and a devise over to be equally divided among the sons on the death of the first devisee. For of a chattel there can be no remainder which may vest and afterward open to let in after-born children and the interest in it must be contingent until the time provided for the distribution of it in order that they may take.'" So in *Timins v. Stackhouse*, 27 Beav. 434 (1860), after A's death "to her brothers and sisters or their children," all the brothers and sisters having died before A; *Gill v. Barratt*, 29 Beav. 372 (1860), to A and B for A's life—remainder to B, and if he die without lawful issue, to "my *then living grandchildren*"—B died before A, without issue, and testator's grandchildren, living at A's death, took; *Madden v. Ikin*, 2 Dr. & Sm. 207 (1862), remainder, after a life estate to A, to the "two eldest children" of testator's sons and daughters—i. e., liv-

ble) devolve to their respective representatives; (*u*) though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential. (*v*)

The preceding rule of construction applies not only where the future devise (*i. e.*, future in enjoyment) consists of a limitation of real estate by way of remainder, or a corresponding gift of personalty (of which there cannot be a remainder, properly so called), but also to executory gifts made to take effect in defeasance of a prior gift. Therefore, if a legacy be given to B, son of A, and, if he shall die under the age of twenty-one, to the other children of A, it is clear that on the happening of the contingency all the children who shall *then* have been born (including, of course, the children, if any, who may have been living at the testator's death), are entitled. (*w*) The principle, indeed, seems to extend to every future limitation; *e. g.*, to a gift to the testator's children, to be divided among them at the end of twenty years after his death.] (*x*)

But the subjecting of lands devised to trusts for partial purposes, as the raising of money, payment of annuities, or the like, by which the vesting in possession is not postponed, does not let in children born during the continuance of those trusts.

Thus, in *Singleton v. Gilbert*, (*y*) where A devised her real estate to

ing at the time of distribution; *Ayscough v. Savage*, 13 W. R. 373 (1865), to children of A and B "living at their respective deaths;" *Phene's Trusts*, 5 L. R., Eq. 346 (1868); *Howard v. Collins*, 5 L. R., Eq. 349 (1868); *Wellock v. Ostle*, 21 W. R. 118, 27 L. T. R. (N.S.) 481 (1872), to wife for life, remainder to children, "with benefit of survivorship;" *Drew v. Drew*, 22 W. R. 314 (1874), where, after a life estate to A, there was a remainder to B; and, if B die before A, to B's children "then living"—the children living at B's death took. "So, too, if the life interest is determinable on bankruptcy or some other event, the class is fixed at the time of determination, unless the shares are not to be paid till the death of the tenant for life. If no children are born before the death of the tenant for life, all after-born children are admitted. But the rule does not apply if there is a clear intention that

distribution is to be made once for all when the fund falls into possession," *Theobald on Wills* 142.

(*u*) *Att.-Gen. v. Crispin*, 1 B. C. C. 386; *Devisme v. Mello*, Id. 537; *Middleton v. Messenger*, 5 Ves. 136; [*Cooke v. Bowen*, 4 Y. & C. 244; *Watson v. Watson*, 11 Sim. 73; *Locker v. Bradley*, 5 Beav. 593; *Salmon v. Green*, 13 Jur. 272; *Evans v. Jones*, 2 Coll. 516, 524; *Pattison v. Pattison*, 19 Beav. 638.]

(*v*) See judgment in *Matthews v. Paul*, 3 Sw. 339; *Houghton v. Whitgreave*, 1 J. & W. 150. See also *Crooke v. Brookeing*, 2 Vern. 106; [*Baldwin v. Karver*, Cowp. 309.]

(*w*) *Haughton v. Harrison*, 2 Atk. 329; *Ellison v. Airey*, 1 Ves. 111; *Stanley v. Wise*, 1 Cox 432; [*Baldwin v. Rogers*, 3 D., M. & G. 649.]

(*x*) *Oppenheim v. Henry*, 10 Hare 441.

(*y*) 1 Cox 68, 1 B. C. C. 542, n.

Mere charging
of lands does
not let in future
children.

trustees for 500 years, to raise £200, and then to other trustees for 1000 years, out of the rents to pay the interest thereof, and certain life annuities; and, subject to the said terms, she gave the estate to all and every the child and children of her brother T. in tail, as tenants in common. One question was, whether a child born after the death of A, but in the lifetime of the annuitants, could take jointly with two others born before A's death? It was insisted, on behalf of such child, that the devise was to be considered as vesting at the time when the trusts of the term were satisfied, and, consequently, that it let in all such children of T. as were then alive. Lord Thurlow admitted that where the legacy is given with any suspension of the time, so as to make the gift take place either by a fair or even by a strained construction (for so, he said, some of the cases go), at a future period, then such children shall take as are living at that period. But this was an estate given directly, although given charged with the terms, and therefore he could not consider the after-born children as entitled.

[The same rule is applicable to personal estate; so that where a testator directs that a particular sum shall be set apart for a temporary purpose (as a life-annuity), and that it shall afterwards fall into the residue, and the residue is bequeathed to the children of A, those children who are in existence at the time of the testator's death are alone entitled to the particular sum (subject to the temporary purpose), as well as the residue. (z)]

The rule was applied in *Coventry v. Coventry*, (a) where the general estate was devised subject to a life estate in part. A testator devised certain freehold and other estates in trust out of one moiety of the annual proceeds to pay one-half of his debts, &c., and the remainder of that moiety he gave to his wife for life, and at her death directed that the said moiety should go into and form part of his residuary estate, and be held upon the same trusts; and out of the other moiety to pay the other half *part of his debts, &c., and accumulate the remainder until 1875 (twenty-one years from his death), when the

[(z) *Hill v. Chapman*, 3 B. C. C. 391, 1 Ves., Jr., 405; see *Cort v. Winder*, 1 Coll. 320.

(a) 2 Dr. & Sm. 470. See also *Lill v. Lill*, 23 Beav. 446; *Hagger v. Payne*, Id. 474; *Bortoft v. Wadsworth*, 12 W. R. 523. On a somewhat similar principle the same

class of children as take the original share of a fund given to their parent for life have sometimes been held to take accpying shares coming by failure of another stirps; as to which see further ch. XLVII., § 2. In *re Ridge's Trusts*, L. R., 7 Ch. 665 *Heasman v. Pearse*, Id. 660.

second moiety was to fall into and become part of, and be disposed of in like manner as, his residuary estate: he also gave his wife a life interest in certain specific portions of his personalty, which at her death were also to fall into his residuary estate: and he gave the residue of his real and personal estate to his son A, his daughter-in-law B, widow, and all his grandchildren, share and share alike. Sir R. Kindersley, V. C., held that the same class of grandchildren were entitled to the property in which the wife had a life interest as to the general residue, viz. those living at the testator's death.

The result might be different if the context showed an intention to treat the funds separately. As an example of such treatment, though not involving the exact point in question, reference may be made to *King v. Cullen*, (b) where a testator directed a fund to be set apart to answer an annuity for his wife, for her life; at her death to sink into the residue; and bequeathed the residue to his children as tenants in common; provided that in case any of them should die either in his lifetime or after his decease, before their shares should become vested interests leaving issue, such issue should have their parents' share. One of the children who survived the testator died in the widow's lifetime, leaving a daughter; and Sir J. K. Bruce, V. C., held, that although the deceased child took absolutely such part of the residue as was not set apart for the annuity, yet her share in the fund that was so set apart went to her daughter. The ground of this decision would seem to have been that by no other construction could the gift over have any operation, since no child could die *after the testator's decease* without attaining a vested (c) interest in the general residue.

The rule which makes a gift to children comprehend all who come into existence before the time of distribution is not peculiar to that class of relations; for, that which is held a wise rule with regard to one grade of relationship must also be so held with regard to another.] (d) Thus a gift to A for life and after his death to his brothers, will include the brothers born during the life of A; (e) and the same has been held with regard to

Gifts to other classes of relations governed by same rules.

(b) 2 De G. & S. 252. See also *Gardner v. James*, 6 Beav. 170, where distribution was by the will expressly postponed.

(c) The word "vested" was held to mean *vested in possession*, on the same ground.

(d) See per Turner, L. J., 3 D., M. & G. 656.]

(e) *Devisme v. Mello*, 1 B. C. C. 537; *Doe d. Stewart v. Sheffield*, 13 East 526. See also *Leake v. Robinson*, 2 Mer. 363.

*nephews and nieces, (*f*) [and cousins; (*g*) but with regard to] other classes of objects the gift would clearly apply and be confined to those who were living at the death of the testator. (*h*)¹²

II. 3.—It has been also established, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i. e.*, the period when the fund becomes distributable in respect of *any* one object, or member of the class. (*i*)¹³ And the result is the same where the expression is “*all the children.*” (*k*)¹⁴

Rule where distribution is postponed to a given age.

(*f*) *Balm v. Balm*, 3 Sim. 492. [See also *Shuttleworth v. Greaves*, 4 My. & C. 35; *Cort v. Winder*, 1 Coll. 320; In re *Partington's Trust*, 3 Gif. 378.

(*g*) *Baldwin v. Rogers*, 3 D., M. & G. 649.

(*h*) As to gifts to next of kin, depending as they do on peculiar considerations, see *ante* p. 128.] Many cases might be suggested in which a gift to objects *in esse* would open and let in future objects; as to A and the heirs of the body of B, a person living, or to A and any wife whom he shall marry. See *Mutton's Case*, Dy. 274 b.

12. See ch. XXVIII., u. 16, and ch. XXIX., n. 34.

(*i*) 1 Ves. 111; 1 B. C. C. 530; *Id.* 582; 3 B. C. C. 401; *Id.* 416; 2 Ves., Jr., 690; 3 Ves. 730; 6 Ves. 345; 8 Ves. 380; 10 Ves. 152; 11 Ves. 238; 3 Sim. 417, 492; 2 Beav. 221; [1 Beav. 352; 12 *Id.* 104; 7 Hare 473, 477.] But see 5 Sim. 174; [2 Ves. 83.]

13. The rule as to ascertainment of the class to take a gift to be paid at a certain age, or to such as attain a certain age, is thus concisely laid down in *Theobald on Wills* 143, 144.

“1st. If any member of the class attain twenty-one in the testator's lifetime the

class is fixed at the testator's death (not including a child *en ventre* at testator's death.)

“2d. If not, all born at the testator's death and coming into existence before the eldest attains twenty-one, are admitted.

“3d. It seems doubtful whether if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one.

“There are the following exceptions to the rule: *a.* If the time fixed for payment would carry the class beyond the limits of perpetuity, members coming into existence after the testator's death, and before the time of payment will not be admitted. *b.* Maintenance out of the shares or presumptive shares of children will not extend the class, but if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one—if for instance maintenance is directed out of vested and presumptive shares, all children will be let in. *c.* If distribution is to be made when all attain twenty-one or when the youngest attains twenty-one, all children will be admitted; though the class would again be restricted if the distribution is to be

(*k*) *Whitbread v. Lord St. John*, 10 Ves. 152.

14. *Wms. Ex'rs* (6th Am. ed.) 1091.

This rule of construction must be taken in connection with, and not as in a measure intrenching upon the two preceding rules. Thus, where a legacy is given to the children, or to all the children, of A, *to be payable at the age of twenty-one*, or to Z for

Does not clash with the preceding rules.

made when the youngest for the time being attains twenty-one. *d.* When the gift is of a particular sum to each member of the class, the class is fixed at the death of the testator, whether possession is postponed to twenty-one or not, and if there are no children then in existence, the gift fails." See also to the same effect *Wms. Ex'rs* (6th Am. ed.) 1174; *Hawkins on Wills* 75; *O'Hara on Int. of Wills* 294. See, too, *Hubbard v. Lloyd*, 6 Cush. 522; *Drake v. Pell*, 3 Edw. Ch. 251; *Wilson v. Cobbin*, 1 Pars. Sel. Cas. 347; *Heisse v. Markland*, 2 Rawle 274; *Van Hook v. Rogers*, 3 Murphy (N. C.) 178; *Fleetwood v. Fleetwood*, 2 Dev. Eq. 222; *Simpson v. Spence*, 5 Jones Eq. 208; *De Veaux v. De Veaux*, 1 Strobh. Eq. 283; *Richardson v. Sinkler*, 2 Desaus. 127; *Handberry v. Doolittle*, 38 Ill. 206; *Locke v. Lambe*, 4 L. R., Eq. 372; *Bateman v. Gray*, 29 Beav. 447 (1861.) This case was a gift to the "children of A now born or hereafter to be born who shall attain 21," with provision for maintenance and advancements out of "vested or presumptive shares." It was held that the class was to be ascertained when the oldest reached twenty-one, but this decision was subsequently reversed (6 L. R., Eq. 215,) and all the children were held to take "vested" shares by reason of the language of the will; *Parsons v. Justice*, 34 Beav. 598 (1865), a gift to A for life—remainder to the children of B living at testator's death or born afterward "who shall attain 21, * * * no child attaining 21 to be excluded in consequence of another child having previously obtained a vested interest," and the class was held to be ascertained on the happening of A's death or the oldest child attaining twenty-one, whichever happened last—and children born after

the happening of both events were excluded; *Dawson v. Oliver-Massey*, 2 L. R., Ch. Div. 753 (1869), following the rule in the text; *Gimblett v. Purton*, 12 L. R., Eq. 427 (1871), "to such of my grandchildren as shall attain the age of 21," with provision for maintenance during minority out of presumptive share; *Williams v. Williams*, 6 L. R., Ch. App. 782 (1871.) In this case there was a gift to A for life, with remainder to all her children "who shall be living at the time of her decease—to be a vested interest in them respectively on their respectively attaining the age of 21, but not to be transferred to them until after the death of A." It was held that children attaining twenty-one, and dying before A, were excluded; but that children surviving A, and dying under twenty-one, would have taken, *Hatherly*, L. C., saying: "I think that the testator here has used the word 'vested' in the sense of 'payable.'" *Garratt v. Weeks*, 20 L. R., Eq. 647 (1875), follows *Gimblett v. Purton*, above cited; see also *Deighton's Trusts*, 2 L. R., Ch. Div. 783 (1876), in which case there was a life estate to the widow, and on her death a remainder to the children of testator "then living," to be paid on the youngest attaining twenty-one, and it was held that a child who died after the youngest attained twenty-one, but before the widow's death, took no vested interest; and to like effect, *Selby v. Whittaker*, 26 W. R. 117, 6 L. R., Ch. Div. 239 (1877); *Morton v. Morton*, 8 Barb. 18. Many cases, however, have inclined to an earlier period of vesting, and this has been generally done whenever the attaining of the age fixed could be construed to be a time fixed merely for the payment of a gift already vested. *Emerson v. Cutler*, 14 Pick. 108,

life, and after his decease to the children of A, *to be payable at twenty-one*, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z, have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained twenty-one, then all the children of A who may subsequently come into existence before one shall have attained that age will be also included: (l) [in short, whichever event happens last marks the period of distribution and for ascertaining the class. So in *Brandon v. Aston*, (m) where a fund was given in trust for A for life or until alienation, and in either event, for such of A's children as should attain twenty-one, to be paid to them on attaining that age, if the same should happen after the death of A, and if he should be then living, to be paid on his *death. A's interest having ceased by his alienation, two of his children who were adult claimed immediate payment of their shares; but this was refused by Sir J. K. Bruce, V. C., since that would prejudice any claim which after-born children of the father might have.]

And the construction is not varied by the circumstance of the trustees being empowered to apply all or any part of the shares of the

in which case there was a bequest of both real and personal property to A for life, with a remainder to his children, and a residuary gift to testator's children, "to be distributed as they respectively arrive at the age of 21," and testator's children were held to take a vested interest in the residue at testator's death, the remainder in the personal property vesting at A's death; *Winslow v. Goodwin*, 7 Metc. (Mass.) 375, remainder to children "to be paid as they attain 21;" *Collin v. Collin*, 1 Barb. Ch. 636, same as last; so, too, *Doubleday v. Newton*, 27 Barb. 431; *Buckley v. Read*, 15 Penna. St. 83, after life estate to widow remainder to testator's "surviving children * * * as they arrive at 21;" so a gift to A until testator's youngest child attains twenty-one, then to all his "surviving children," *Hempstead v. Dickson*, 20 Ill. 193; see, too, *Perry v. Rhodes*, 2 Murphy (N. C.) 140, and *Hocker v. Gentry*, 3 Metc. (Ky.) 463, in both of which cases the gift was held to

be vested in the children at testator's death, notwithstanding that it was "to be divided when the youngest child attains 21." In the following English cases, too, the gift was held to vest at the testator's death, and to open and let in after-born children: *Pearman v. Pearman*, 33 Beav. 394 (1864,) a remainder to children of A "as and when they attain" twenty-one, it being a residuary gift, with provision for maintenance in the meanwhile, and a gift over on failure of issue; *Simpson v. Peach*, 16 L. R., Eq. 208 (1873,) the legacy made payable to class at A's death, "the shares to be vested interests on the majority of each," was held to vest at A's death, "vested," here, referring to possession.

(l) *Clarke v. Clarke*, 8 Sim. 59. See also *Matthews v. Paul*, 3 Sw. 328; [*Robley v. Ridings*, 11 Jur. 813; *Gillman v. Daunt*, 3 K. & J. 48; In re *Emmet's Estate*, 13 Ch. D. 484.

(m) 2 Y. & C. C. C. 24, 30, see minute of decree.]

children for their advancement before the distribution (the word "shares" being considered as used in the sense of "*presumptive shares*;")⁽ⁿ⁾ nor is any such variation produced by a clause of accruer, entitling the survivors or a single survivor, in the event of the death of any or either of the "said children," as the expression "said children," so occurring, means the children designated by the prior gift, whoever they may be, and is, therefore, applicable no less to an after-born child, whom the ordinary rule of construction admits to be a participator, than to any other. (o)

The rule in question, as it respects the exclusion of children born after the vesting in possession of *any* of the shares, has been viewed with much disapprobation; and Lord Thurlow, in *Andrews v. Partington*, (p) said he had often wondered how it came to be so decided; there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children. In marriage settlements, however, one at least of the parents generally takes a life interest, so that the shares do not vest in possession until the number of objects is fixed. The rule has gone, Lord Eldon remarked, (q) upon an anxiety to provide for as many children as possible with convenience. Undoubtedly it would be very inconvenient, especially in the case of legacies payable instant, if the shares of the children were, by reason of the possible accession to the number of objects by future births, unascertainable during the whole life of their parent; and though this inconvenience is actually incurred, as we shall presently see, in some cases, (r) in which the gift runs through the whole line of objects, born and unborn, *even after vesting in possession in the existing children, yet it will be found in such cases either that the construction was adopted *ex necessitate rei* (there being no alternative but either to admit *all* the children, or hold the gift to fail *in toto* for want of objects,) or, that the admission of all the children was compelled by some expressions of the testator.

Judicial
opinions upon
rule which
excludes
children born
after eldest
attains twenty-
one.

(n) *Titcomb v. Butler*, 3 Sim. 417. [As to the effect of such a clause to postpone the ascertainment of the class, see below, p. *165.]

(o) *Balm v. Balm*, 3 Sim. 492; [cf. *Matchwick v. Cock*, 3 Ves. 611; *Free-mantle v. Taylor*, 15 Id. 363.

(p) 3 B. C. C. 401. See also per Lord

Rosslyn, Hoste v. Pratt, 3 Ves. 732; per K. Bruce, V. C., *Brandon v. Aston*, 2 Y. & C. C. C. 30; *Darker v. Darker*, 1 Cr. & M. 850.]

(q) In *Barrington v. Tristram*, 6 Ves. 348.

(r) See *post* pp. *165, *167.

The principle of the rule under consideration seems to apply to all cases in which the shares of the children are made to vest *in possession* on a given event, as on marriage; in which case the marriage of the child who happens to marry first, is the period for ascertaining the entire class. (r)

[When the legacy is not to vest until the period of distribution, all children, born before the eldest acquires a vested interest, —which he does upon the happening of the contingency as to him individually,—may by possibility be participants in the fund. (s) Younger children as to whom the contingency has not happened are, of course, not entitled to anything while the contingency is in suspense: it is uncertain; therefore, by how many the class ultimately entitled may fall short of the number of children living when the contingency happens as to the eldest; but as the class cannot, in consequence of the application of the rule, be enlarged, the minimum of each share is immediately fixed.

The foregoing rules, which admit all children coming *in esse* before the period of vesting or of possession, will (like other rules of construction) be generally adhered to, although the gift may in consequence fail for remoteness, as, where the gift is to the children of a living person to vest at the age of twenty-two. (t) But if a distinct vested gift be followed by a direction postponing distribution beyond the legal period, the direction will be rejected as void, and the gift left intact, as in *Kevern v. Williams*, (u) where a testator bequeathed the residue of his personal estate in trust for A for life, with remainder to the grandchildren of B, “to be by them received in equal proportions when they should severally attain the age of twenty-five years.”

On the question of remoteness being raised, it was held by Sir *L. Shadwell, V. C., that the grandchildren who had come *in esse* before A's death were alone entitled. He distinguished *Leake v. Robinson* because there the time of gift was not distinct from the time of enjoyment.]

[(r) *Dawson v. Oliver-Massey*, 2 Ch. D. 753, acc.

(s) *Clarke v. Clarke*, 8 Sim. 59; *Gillman v. Daunt*, 3 K. & J. 48; *Locke v. Lambe*, L. R., 4 Eq. 372.

(t) *Leake v. Robinson*, 2 Mer. 363, 383; *Arnold v. Congreve*, 1 R. & My. 209; *Comport v. Austen*, 12 Sim. 218; *Boughton v.*

James, 1 Coll. 43, 1 H. L. Cas. 406. *Elliott v. Elliott*, 12 Sim. 276, appears *contra*, *sed qu.* If any one of the class has attained the age in the testator's lifetime, the gift is good, because no after-born child is admissible, *Picken v. Matthews*, 10 Ch. D. 264.

(u) 5 Sim. 171, cited 16 Sim. 285.]

But an important exception obtains in the case of legacies which are to come out of the general personal estate, and are made payable at a given age (say twenty-one); in which case it seems that the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of postponing the distribution of the general personal estate until the majority of the eldest legatee, which would be the inevitable effect of keeping open the number of pecuniary legatees; (x) [and if there is no child in existence at the testator's death, the legacies fail altogether.] (y) But this argument of inconvenience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount, (z) [nor where a definite sum is directed to be set apart to answer the legacies, and the legacies are to come only out of that sum.] (a)

Exception as to general legacies.

The rule in question, so far as regards the exclusion of children born after the vesting in possession of any one of the distributive shares, has been sometimes departed from upon grounds which can scarcely be considered as warranting that departure. Thus, where (b) a testator bequeathed £300 to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage*, with interest, and failing the share of any, to the survivors, and failing the share of *all*, then to G. One of the questions was, whether the legacy belonged to a child of S., born at the making of the will, to the exclusion of those since born, or to be born? Lord Hardwicke thought it was meant for the benefit of *all the children S. should have*; for the testator, knowing she had but one then, had yet given it to *children*, had pointed out survivors, and given it over to another branch of the family, which he could not mean, till all failed.

Other cases in which the rule has been departed from.

It is clear that none of these circumstances would now be held to take the bequest out of the ordinary rule. Its being to children in the plural, with a provision for survivorship, was *consistent with that construction; as was the word "all," which

Remark on Maddison v. Andrew.

(x) *Ringrose v. Bramham*, 2 Cox 384; [Peyton v. Hughes, 7 Jur. 311; Mann v. Thompson, Kay 638.] And see *Storrs v. Benbow*, 2 My. & K. 46.

[(y) *Rogers v. Mutch*, 10 Ch. D. 25.]

(z) *Gilmore v. Severn*, 1 B. C. C. 582.

[(a) *Evans v. Harris*, 5 Beav. 45. But

until the number of legatees is finally ascertained, there is always a possibility of the fund proving deficient. As to abatement in such a case *vide* *Ib.* and 19 Ves. 570.]

(b) *Maddison v. Andrew*, 1 Ves. 58.

was satisfied by referring it to the children of any class who took shares.

Lord Loughborough seems to have thought that where a devise or bequest of the nature of those under consideration is followed by a gift over in case the parent die without issue, all children, without reference to the period of vesting in possession, are entitled. Thus, where (c) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. and R., such of the children as should be sons *to be paid at their respective ages of twenty-one*, and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively; and he bequeathed the residue of his personal estate to be equally divided between *the child and children* of his said two daughters, *in like manner as the money to arise from his real estate*; and, in case any child of his said daughters should marry and die in the lifetime of their respective mothers, then he directed that the issue of such child should stand in the place of their parent; *and, in case his said daughters should die without issue*, or such issue should die without issue in the lifetime of his said daughters, then over. It appeared, in the consideration of another question, that Lord Loughborough had previously decided, that the latter disposition extended to all the children of testator's daughters without reference to the age of twenty-one, by force of the clause limiting it over in case of the failure of issue of the daughters.

It is not easy to perceive any solid ground for allowing to these words such an effect upon the construction. They either mean a failure of issue generally, in which case the gift over is void, or, which seems to be the better construction, they refer to children, (d) and, according to the opinion of Sir [R. P. Arden] in *Godfrey v. Davis*, (e) and the established rules of construction, the words importing a failure of issue are referable to the objects included in the previous gift.

It is to be observed, that *Maddison v. Andrew*, and *Mills v. Norris*, were decided at a period when the rule against which they seem to militate was not so well settled, or, at all events, they show that it was not so uniformly adhered to, as it now is. *The uncertainty in which

(c) *Mills v. Norris*, 5 Ves. 335.

XL., § 2.

(d) See *Vandergucht v. Blake*, 2 Ves.,

(e) 6 Ves. 50.

Jr., 534, and other cases treated of in ch.

these cases tended to involve the doctrine has been completely removed by subsequent decisions. (*f*)

[If, however, the shares are directed to vest at twenty-one, and maintenance and advancement are expressly authorized out of vested as well as out of presumptive shares, Power of advancement out of vested shares. children born after the eldest has attained twenty-one will be admitted; for it is clear that the trustees were to retain the fund after some had attained a vested interest. (*g*) But a power of maintenance out of the interest of presumptive shares of course has no such effect. (*h*)

Again, the rule is not applicable where the vesting in possession is postponed until the youngest child attains a prescribed age. Where distribution is directed generally at twenty-one, there is no doubt about the time of payment; it is certain that as soon as any child attains the age, the testator intended him to have his share, and after-born children are unavoidably excluded. But it is very doubtful whether by youngest child (in the case supposed) the testator means anything but youngest whenever born: in the absence of an explanatory context, it is mere conjecture that the youngest for the time being *in esse*, or the youngest living at the death of the testator, was meant, admitting those born before, but excluding all born after, such youngest has attained the age.

Thus, in *Mainwaring v. Beevor*, (*i*) where a testator bequeathed the residue of his stock to trustees in trust thereout to maintain his "grandchildren, the children of his sons A and B, until they should severally attain twenty-one," and accumulate the surplus dividends, "and when and so soon as all and every his said grandchildren should have attained twenty-one," in trust to pay and divide the fund among them, Sir J. Wigram, V. C., refused to decree an immediate division of the fund, merely because the youngest grandchild for the time being had attained the age of twenty-one. He adverted to the inconvenience which arose as soon as the elder children attained twenty-one, viz. that the provision for the maintenance of those children ceased, though, as it could not be cer-

Gift to children when the youngest attains twenty-one.

Gift to grandchildren when all have attained twenty-one.

(*f*) See cases referred to, *ante* p. *160.

[(*g*) *Iredell v. Iredell*, 25 Beav. 485; *Bateman v. Gray*, L. R., 6 Eq. 215. See also *Berry v. Briant*, 2 Dr. & Sm. 1, where distribution was postponed after the age of vesting by reason of the whole income being given for the common maintenance

of the legatees (named) during the life of their parent.

(*h*) *Gimblett v. Purton*, L. R., 12 Eq. 427.

(*i*) 8 Hare 44. See also *Bateman v. Foster*, 1 Coll. 118, 126.]

tainly said that the youngest child had attained twenty-one, they could not claim a distribution of the *fund; and continued, "The question is, how long is the eldest child or the other children to wait? If the objects of the testator's bounty can be confined to children of his sons living at his death—which, independently of the fact that one son had no children at that time, I am clear cannot be done in this case,—it might be possible to get the conclusion that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it be once admitted that a child born after the death of the testator may take, all the inconvenience is let in, and the eldest child may have to wait an indefinite time, so long as children may continue to be born. How in that case is it possible to limit the class entitled in the way suggested, which is, the moment the youngest child *in esse* attains twenty-one, there is to be a division, although there may be an unlimited number of children born afterwards? I do not see how the inconvenience can be avoided. The words of the will do not require an immediate distribution."]

In *Hughes v. Hughes*, (*k*) a testator gave real and personal estate in trust to pay the income for the maintenance of all the children of his three daughters A, B, and C, share and share alike, until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of them before the youngest [of those *living*] should attain twenty-one, leaving children, then to such children, and when the youngest grandchild [*living*] should have attained twenty-one, then he gave one full proportionable share to such of his said grandchildren as should be then living, and the children of such as should be then dead. A question arose on the claim of the subsequently-born grandchildren to be admitted to a participation with those living at the testator's death. Lord Thurlow, during the argument, said, when the gift is general, it is always confined to the death of the testator. Where there is a gift for life, or the distribution is postponed to a future time, then children born during the life or before that time are let in. On a subsequent day he decided in favor of the after-born grandchildren, the gift being to *all the grandchildren*. [He distinguished the cases where the time for vesting the property in possession was perfectly marked out by the testator, and the distribution consequently was confined to those who had come *in esse* at that time: whereas here was a general gift not

(*k*) 3 B. C. C. 352, 434.

narrowed or controlled by any words the testa*tor had used.] By the decree it was declared that the residue should be divisible among the grandchildren of the testator that were living at his death, and that had been born since and that should be born, until the youngest of such grandchildren should attain the age of twenty-one. [This apparently confined the class to those who had come *in esse* when the youngest for the time being attained twenty-one; and the word "living," as used in the trusts of the income, seems to require that construction; but the facts, so far as they can be collected, did not require a decision between that and letting in every child whenever born.] (l) The expression "*all the children*," noticed by Lord Thurlow, has been held, we have seen, to be inadequate to enlarge the construction. (m)

II. 4.—We are now to consider the effect upon *immediate* and *future* gifts to children of a failure of objects at the period when such gift would have vested in possession. With regard to immediate gifts, (n) it is well settled that if there be no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift. 15

Rule where no object exists at period of distribution.

Thus, in *Weld v. Bradbury*, (o) a testator bequeathed certain moneys to be put out at interest; one moiety to be paid to the younger children of M. living at his (the testator's) death, and the other moiety *to the children of S. and N.* Neither S. nor N.

Where the gift is immediate.

[(l) See 14 Ves. 258. The testator died 3d of June, 1782, R. L. 1791 A., fo. 215. Wigram, V. C., thought (8 Hare 50) the decree might mean every grandchild whenever born. But that is inconsistent with the clause "that should be born until the youngest of such grandchildren should attain twenty-one," for none could be born after the birth of the absolute youngest. Mr. Jarman thought "such" referred to the grandchildren living at the testator's death, and that thus "the seeming inaccuracy of the case was corrected." But that is not the grammatical sense. Moreover it appears (14 Ves. 258) to have been assumed that John Erasmus Adam, a grandchild born after the testator's death, who attained twenty-

one in 1806, and was the youngest for the time being, was the youngest "living" within the meaning of the will.]

(m) *Whitbread v. St. John*, 10 Ves. 152; see also *Heathe v. Heathe*, 2 Atk. 121; *Singleton v. Gilbert*, 1 Cox 68, 1 B. C. C. 542, n.; *Scott v. Harwood*, 5 Mad. 332.

(n) Where a person taking a preceding life interest dies in the testator's lifetime, the gift is of course treated as immediate.

15. Wms. Ex'rs (6th Am. ed.) 1175; *Hawkins on Wills* 70; *Theobald on Wills* 142; *Flood on Wills* 515. See, too, *Ross v. Adams*, 4 Dutcher 160, where a like limitation was made by deed.

(o) 2 Vern. 705. See also *Haughton v. Harrison*, 2 Atk. 329.

had any child living at the date of the will, (*p*) or at the death of the testator. It was held to be an executory devise, (*qu.* bequest?) to such children as they or either of them should *at any time* have.

So, in *Shepherd v. Ingram*, (*q*) a gift of the residue of the testator's real and personal estate to such child or children as A should have, taking upon them the name of S., was held to embrace all after-born children, there being no child at the testator's death.

[In these cases there was nothing to show that less than all must be admitted, if any. But if the shares are directed to vest, or to be paid, when the children respectively attain twenty-one, it would seem to agree best with the principle of the preceding rules, and still more closely with the rule presently mentioned, of which *Whitbread v. Lord St. John* (*r*) is the leading example, that only those children should be admitted who have come into existence before the eldest attains the prescribed age. In *Armitage v. Williams* (*s*) the income of certain securities was directed "to be applied to the education of the children of A and B in equal shares, and on their attaining the age of twenty-one years the whole to be sold and divided equally among them. Should the said A and B die without issue the fund was given on the same conditions to the children of C and D. It was held by Sir J. Romilly, M. R., that all the children whenever born were entitled: but this was apparently because the will was considered to direct a division when *all* the children had attained the age, and thus to bring the case within *Mainwaring v. Beavor*.]

Devises and bequests of this nature have given rise to two questions: 1st, As to the destination of the income between the period of the testator's death and the birth of a child: secondly, As to the appropriation of the income between the birth of the first and the birth of the last child.

With respect to the first, if the subject of gift be a sum of money, it is sufficient to say that the legacy is not payable until the birth of a child. It is also clear, that where a *residue* of personalty is given in this manner, the bequest will carry the intermediate produce as part of such residue. (*t*) On the other hand, if it

Destination of
income until
birth of child.

(*p*) This was immaterial.

(*q*) *Amb.* 448.

[(*r*) 10 Ves. 152, *post* p. *180.

(*s*) 27 Beav. 346. No reasons are reported. The judgment is more fully reported 7 W. R. 650, but with a statement

of the "rule of the court for ascertaining the period of distribution" which must not be taken as the general rule.]

(*t*) *Harris v. Lloyd*, T. & R. 310. See *Bullock v. Stones*, 2 Ves. 521.

were a devise of real estate, the rents accruing between the death of the testator and the birth of a child would devolve upon the heir as real estate undisposed of, unless there was a general residuary devise; (u) nor would the circumstance *of there being an immediate devise of the real estate to trustees (x) vary the principle, the only difference being, that the heir would take the equitable, instead of the legal interest. The great difficulty, however, in these cases, is to determine whether the will indicates an intention to accumulate the immediate rents for the benefit of unborn objects. A question of this kind was much considered in *Gibson v. Lord Montfort*, (y) where A gave his freehold and personal estate to trustees, in trust to pay certain annuities and legacies out of the produce of his personal, and, in case of deficiency, out of his real estate, and he gave the residue of his real and personal estate *to such child or children as his* ^{Immediate income was held to accumulate.} *daughter B should have*, whether male or female, equally to be divided between or among them. If B should die without issue of her body, then over. By another clause, A directed, that, upon the deaths of the persons to whom the annuities for lives were given, such annuities as should fall in from time to time should go back to the residue, *and go to those in remainder over*. By a codicil he added, provided his daughter died without issue, but *if she should leave a child or children, such annuities as fell in should be divided among them, share and share alike*. B having no child at the death of the testator, it became necessary to determine the destination of the immediate income. It was admitted, that, as to the personal estate, it passed by the residuary clause, but the accruing profits of the real estate subject to the charges were claimed by the heir as undisposed of. Lord Hardwicke, after a long argument on the terms of the will, and, after admitting that the heir was entitled to what was not given away by express words or necessary implication, held that the intermediate profits passed to the trustees for the benefit of the devisees; thinking, upon the whole, that there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause, (z) and on the expression in the will and codicil respecting the annuities.

The other question arising on these gifts to children is, as to the

(u) *Harris v. Lloyd*, T. & R. 310, and *Hopkins v. Hopkins*, Cas. temp. Talb. 44.

(x) *Bullock v. Stones*, 2 Ves. 521.

(y) 1 Ves. 485.

(z) On this point, *vide Genery v. Fitzgerald*, Jac. 468, and other cases commented on, Vol. I., p. *653.

Children for
the time being
take the whole
income.

destination of the income accruing in the interval between the births of the eldest and the youngest child, with respect to which it is settled, (nor could it have been doubted upon principle,) that the children for the time being take the whole.

This question came before Lord Northington, in *Shepherd v. *Ingram*, (a) on the construction of the will already stated, at the instance of three of the children of the testator's daughter, who had come into existence since the former hearing of the case, and now prayed (their parent being yet alive) to have an account of the profits, and that so much as became due from the birth of the first child, until the second was born, might be declared to belong to the first, and after the birth of the second, until a third was born, to belong to the first and second child, and so on to the others; and his lordship was very clearly of opinion, that the children (b) took a defeasible interest in the residue, suggesting the case of a legal devise of a residue to the daughters, with a subsequent clause declaring that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters in that case would be clearly entitled to the interest and profits till that contingency happened.

[So,] in a subsequent case, (c) it was held by Lord Loughborough that a child subsequently born was [not] entitled to a share in the by-gone income, in equal participation with children antecedently in existence; the special terms of the gift, which expressly comprised the "interest and produce," [being considered insufficient to control] the general rule, which was also followed by Lord Langdale (d) [and Sir J. Wigram. (e)]

If the bequest be contingent, a child only presumptively or contingently entitled is, for the purpose of answering either of the above questions, to be considered as not in existence; so that in the first case the intermediate profits will go to the next of kin or heir-at-law, or to the residuary legatee or devisee, (f) and in the second, to the children who have attained a vested interest.

Disposition of
income before
contingent
legacy vests.

(a) Amb. 448, ante *167.

(b) The word in the report is "daughters;" but this was evidently used in mistake for children.

(c) *Mills v. Norris*, 5 Ves. 335.

(d) *Scott v. Earl of Scarborough*, 1

Beav. 154.

[(e) *Mainwaring v. Beevor*, 8 Hare 44, see minute of decree, p. 51; *Ellis v. Maxwell*, 12 Beav. 104.

(f) *Haughton v. Harrison*, 3 Atk. 329; *Shawe v. Cunliffe*, 4 B. C. C. 144.

notwithstanding the existence of children who have not yet but may hereafter become entitled to a share.] (g)

The next inquiry is as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A for life, and after his decease, *to the children of B; and B has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B were a legal remainder of freehold lands, it would [unless saved by stat. 40 and 41 Vict., c. 33] fail by the determination of the preceding particular estate before the objects of the remainder came *in esse*. (h) This rule, however, originating in feudal principles, is not applicable to equitable limitations of freehold estate, and accordingly it has been held, that in a similar devise by way of trust, the ulterior limitation does not fail by the non-existence of objects during the life of A, the tenant for life, but takes effect in favor of such objects whenever they come into existence. Thus in *Chapman v. Blisset*, (i) where lands were devised to trustees upon certain trusts during the life of A, and at his decease as to one moiety in trust for the children of A, and as to the other moiety, in trust for the children of B. B had no child born until after the decease of A; and it was held that such after-born child was entitled to the latter moiety; Lord Talbot observing, that, "in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented." The same doctrine would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable. As some of the positions, however, advanced by a very learned judge in *Godfrey v. Davis*, (k) may seem to be inimical to such a conclusion, it will be necessary to examine that case.

A bequeathed annuities to several persons for life, and directed that the first annuity that dropped in *should devolve upon the eldest child* male or female for life of H.; and he

Effect where there is no object at or before time of distribution.

Godfrey v. Davis considered.

(g) This seems a necessary conclusion, C. C. C. 30.

and appears now to be supported by authority, *Furneaux v. Rucker*, W. N. 1879, p. 135. See also *Stone v. Harrison*, 2 Coll. 715; but see *Brandon v. Aston*, 2 Y. &

(h) *Ante* Vol. I., pp. *263, *873.]

(i) Cas. temp. Talb. 145.

(k) 6 Ves. 43.

directed that as the annuities dropped in, they should go to increase the annuities of the survivors, and so to the last survivor, except as to two individuals named; and when the said annuitants were all dead, the whole property to devolve upon the heirs male of P. *At the death of the first annuitant, H. had no legitimate child* (the claim of a natural child was disallowed;) (l) but he afterwards married, and had a child, who claimed the annuity. Sir R. P. Arden, M. R., said,—“It is clearly established by *Devisme v. Mello*, (m) and many other cases, that where a testator gives *any legacy or benefit to any person, not as *persona designata*, but under a qualification and description at any particular time, the person answering the description at that time is the person to claim; and, if there are any persons answering the description, they are not to wait to see whether any other persons shall come *in esse*, but it is to be divided among those capable of taking, when by the tenor of the will he intended the property to vest in possession. (n) That case was much considered by Lord Thurlow, and seems to have settled the law upon the subject. The first question is, whether it is clear the testator meant any given set of persons should take at any given time? if so, it is clear that all persons answering that description, whether born before or afterwards, (o) shall take; but, if there are no such persons, it shall not suspend the right of others, but they shall take as if no such persons were substituted. Before that case, this point was not quite so clear. (p) Where the gift is to all the children of A at twenty-one, if there is no estate for life, it will vest in all the children coming into existence until one attains the age of twenty-one. (q) Then that one has a right to claim a share, admitting into participation all the children then existing. So if it is to a person for life, and, after the death of that person, then to the children of A, the intention is marked, that until the death of the person entitled for life no interest vests (*qu. in possession?*) When that person dies, the question arises, whether there are then any persons answering that description? if so, they take without waiting to see whether any others will come *in esse* answering the description. *If it is given over in the event that there are no children, and there are no children at that period, the person to whom it is given over takes.* It is clear this testator meant

(l) See next chapter.

(m) 1 B. C. C. 537.

(n) This is indisputable, see *ante* pp. *155, *156.

(o) The words “or afterwards” are not

consistent with the preceding position or with the general rule.

(p) *Singleton v. Singleton*, *Ayton v. Ayton*, 1 B. C. C. 542, n.

(q) See *ante* p. *160.

these annuities to commence at his death, and that each annuitant should receive a proportionable share of his fortune, with benefit of survivorship and right of accruer, subject upon the death of the first annuitant to the substitution of the eldest child of H. Upon the death, therefore, of the first annuitant, unless there was some person who had a right of substitution in the room of that person, and there was no such person, it was to go among the survivors. *The person substituted, namely, the first child of H., cannot now claim.* That construction is much fortified by the manner in which it is given over, for it is perfectly clear that he meant the persons to whom it was given over under the description of the *heirs of P. to take upon the death of the persons to whom it was first given over. If the first construction contended for is to prevail, those persons, supposing all the other annuitants claiming by survivorship were dead, must wait not only the death of the survivor, but also the death of H., for during his life there would be a possibility that a child might be born who upon that construction might say he was the survivor."

It is evident, therefore, that the judgment of the M. R. was partly founded upon the particular circumstances of the case; and yet no one can read that judgment without seeing that in his opinion the rule was universal, that a bequest to children as a class, to fall into possession on the determination of an anterior interest, failed, *if there was no object at that period*: and he seems to have considered this as a necessary consequence of holding that such objects (if any) would have taken to the exclusion of subsequently-born children. That the one proposition is not invariably a corollary of the other, is established, we have seen, by the cases respecting *immediate* gifts to children, which although they extend only to such children (if any) as are in existence at the death of the testator, yet, in case of there being at that period no child, will embrace the *whole* range of unborn children. (r) Upon what principle a different construction could be supported in the case of an executory bequest preceded by a bequest for life, it is difficult to discover, unless it were for the sake of assimilating the construction to that of a legal remainder, but which is decisively negatived by the construction that has been applied to equitable limitations, as to which we have seen the rule is different; and the inevitable conclusion, it is conceived, is that, by analogy to the latter class of devises, *a bequest to A for life, and after his death to the children of B, is not de-*

Suggested
result of the
cases.

(r) *Ante* *167.

feated by the non-existence of an object at the death of A, but will take effect in favor of ALL the subsequently born children as they arise: assuming, of course, that the terms of the bequest do not bring it within the restrictive rule stated in the third division of the present section.

The doctrine above suggested is tacitly recognized in *Wyndham v. Wyndham*, (s) where a testator bequeathed the residue of his *estate to A for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A should die without any child or children, then he left the residue *to the younger children of B*, if he should have any, and if not, he left it to C. A died without children before B had any, and B afterwards died without having had a child; and the question in this cause was, as to what became of the income in the interval between the deaths of A and B; which question of course assumes, that the property did not go over to C immediately on the death of A without a child, but remained in expectancy during the whole life of B, to await the event of his having children.

This view of the subject, too, seems to derive some support from a more recent decision, establishing that an executory bequest to children, to arise on an event which was to defeat a prior gift, did *not* fail by the absence of any object at the determination of such prior interest.

Executory gift not defeated by failure of objects until after the time of vesting in possession.

In the case (t) alluded to a testator devised the reversion in a moiety of certain real estate to his sister A, subject to a charge in the following terms:—"The sum of £500 I also deduct out of the said part of my estate to my niece M., daughter of my brother R., to be paid when most convenient to my sister A., bearing interest three months after my decease. Whenever this £500 shall be paid by my sister A., I do require that it be put into government or any other security by her trustee P., whom I appoint to act as such, as he shall think most to her advantage; and that the said M. shall receive the said £500, with the accumulated interest, *either on the day of marriage or at the age of twenty-one* as shall be thought best. *Should the said M. not survive*

(s) 3 B. C. C. 58. [See *Shawe v. Cunliffe*, 4 B. C. C. 144, where a gift to the children of A after the death (without children) of B, and in default of children of A to fall into the residue, was construed a gift to the children who survived A by the controlling force of a prior gift, made expressly to such last-mentioned children.

B having died in the lifetime of A the same question, and consequent recognition of the doctrine advocated in the text, occurred here as in *Wyndham v. Wyndham*. See also *Conduitt v. Soane*, 4 Jur. (N. S.) 502.]

(t) *Hutcheson v. Jones*, 2 Mad. 124; [*Houghton v. Harrison*, 2 Atk. 329.]

either of those periods, and there be no child or children of the said R., then I would have the said sum of £500 revert to my sister A. ; but, in case of other children of R., I would have the said sum equally divided, share and share alike." M. died under age, and unmarried. R. had no other child at that time, but other children were born afterwards ; and the question was, whether such subsequently-born children were entitled. Sir T. Plumer, V. C., adverted to *Godfrey v. Davis* as having been decided upon the principle, that a period being distinctly fixed when the distribution was to take place, the children born after that period were not entitled. "Are there (he said) any words in this will fixing the time when a share is to vest, so as to exclude after-born *children ? The property is not given on the children attaining twenty-one, or marriage ; it is a reversionary fund, which is a strong circumstance, and the gift to A. is expressed in unambiguous terms. If the after-born children are excluded, it must be in the teeth of the words of the will, which only give it to A. 'if there be no child or children of the said R.'"^(u) He accordingly decided in favor of the children of R.

This case shows that an executory bequest, in derogation of a preceding gift, does not fail for want of objects at the period of taking effect (though, if there had been any such, it would have been confined to them ;)^(x) and that, in the opinion of the learned judge who decided it, the case of *Godfrey v. Davis* sustains no general doctrine to the contrary, but is referable to its special circumstances.

Remark on
Hutcheson v.
Jones.

In another case, ^(y) where lands were by settlement limited to A for life, remainder to B for life, remainder to trustees for 500 years, in trust to raise £1000 for such persons as B should appoint, and in default of appointment, to the executors, administrators and assigns of C. ; and A and B died in the lifetime of C, without any appointment by B, it was argued that there was at the determination of their estates no object of the trust of the term, since C could have no executor or administrator in her lifetime, and, therefore, that the limitation failed, as in the case of a devise of real estate to the heirs of a person living at the determination of the prior estates : but Sir T. Plumer, M. R., said, *he did not see that the analogy could be applied*. The case, however, was not distinctly decided upon this point.

^(u) As to this, see *post* p. *177.

other cases cited *ante* *157.

^(x) *Ellison v. Airey*, 1 Ves. 111, and

^(y) *Horseman v. Abbey*, 1 J. & W. 381.

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So, in the earlier case of *Lord Beaulieu v. Lord Cardigan*, (z) where the testator bequeathed an exchequer annuity, which was granted for a term of years, to his grandson, Lord Montague, for so many years as he should live, and after his death for such person as, "*at the time of Lord Montague's death*, should be heir male of Lord Montague's body, to take lands of inheritance from him by course of descent, for the residue of the term; and in case there should be no such heir male, then in trust for such person as should be heir male of the body of Duke John, to take lands by course of descent, for the residue of the term; and, in case there should be no such person as should be such heir *male, then in trust for Duke John for life, with remainder to such person and persons as should be entitled by virtue of his said will to the rents of the real estate thereby devised." Lord Montague died without issue before Duke John had a son; and it was held by Lord Northington, that the gift in question took effect in favor of a son who was born six years after this event; observing, that if the limitation to the son of Duke John was to depend on the words "*living at the time of the death of Lord Montague*," it would defeat the intention of the testator; for he meant that the sons of Duke John should take after (*qv.* in substitution for?) the sons of Lord Montague.

The weight of authority, therefore, is decidedly in favor of the position, that all gifts to children, preceded by an anterior interest, will embrace the objects existing at the death of the testator, and those who may come *in esse* before the determination of such interest; and that in all such cases, except in the instance of a legal remainder of real estate, (z) if there be no object at the time of the vesting in possession, all the children subsequently born will be let in, unless the terms of the gift restrict it to a narrower class of objects.

The doctrine, however, of the preceding cases may seem to be encountered by some remarks occurring in *Bartleman v. Murchison*, (a) where an annuity was bequeathed to A for life, and, after her decease, to B "*if a widow*, but not otherwise, but to revert back to any child or children after her death;" and it was held, that B, who was married at the death of A, and afterwards became a widow, was not entitled on such subsequent widowhood; Lord Brougham observing,—“Although,

(z) Amb. 533.

[(z) *I. e.*, a legal remainder not protected by stat. 40 and 41 Vict., c. 33, *ante* Vol. I., p. *874. Unless the rule is as stated in the text, this statute gives effect

to certain legal remainders of real estate, which, if limited with regard to personal estate, would fail.]

(a) 2 R. & My. 136.

in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable ;” and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, he remarked,—“ It is only following out the same principles, to hold, *that a person*, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character and answer that description at the moment when the legacy might vest in possession.”

It will be observed, that, in this case, the bequest was to an *individual named, if then answering a certain description and not to a class, though perhaps the principle applicable to the respective cases is not widely different.

Remark on
Bartleman v.
Murchison.

And here the student should be reminded, that where, in the preceding observations, mention is made of the *objects at the period of distribution*, this is not intended to designate children *existing* at that period ; for it has been already shown, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may therefore not improperly be termed objects *at that period* ; their decease before the period of distribution having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

Existence up
to time of dis-
tribution not
necessary.

It is to be observed, that the rules fixing the class of objects entitled under gifts to children are not in general varied by a limitation over, in case the parent should die without children, or in case *all* the children die, &c., as these words are construed merely to refer to the objects of the preceding gift. It is true, indeed, that in *Hutcheson v. Jones*, some stress was laid by Sir T. Plumer, V. C., on the words giving the property over in default of child or children, as importing that the ulterior gift was not to take effect unless in the event of the failure of *all* the children ; but in *Andrews v. Partington*, (b) a pecuniary legacy to *all* the children of A, payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were *in esse* when the first share became payable. So, in *Scott v. Harwood*, (c) where the devise was to the use and behoof of all and every the child and children of A lawfully

Whether gift
over in default
of children
enlarges class
of objects
entitled.

(b) 3 B. C. C. 401.

(c) 5 Mad. 332.

begotten, and their heirs forever; and in case the said children of A should all die before they attained the age of twenty-one years, then over; Sir J. Leach, V. C., held, that the children of A living at the testator's death were exclusively entitled, and that *in the devise over "the testator must, by necessary inference, be considered as speaking of the children to whom the estate is given."* If it be objected, that in this case the expression "the said children" required such a construction, the answer is, that the preceding gift being to *all* the children, the referential expression had the same force as if the same terms were repeated, and consequently the effect of the whole would be, according to Sir T. Plumer's doctrine in *Hutcheson v. Jones*, that the estate was not to go over until the failure of *all* the children.

Remark on
Scott v. Har-
wood.

II. 5.—We are now to consider how the construction is affected by the words "*to be born*" or "*to be begotten*," annexed to a devise or bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would, but for the words in question, have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to *all* the children who shall ever come into existence; since, in order to give to the words in question *some* operation, the gift is necessarily made to comprehend the whole.¹⁶

Where they
extend the
class.

Thus, in *Mogg v. Mogg*,^(e) where a testator devised the Mark estate to trustees, in trust to pay the rents towards the support and maintenance of the child and children begotten *and to be begotten* of his daughter, Sarah Mogg: it was contended that, notwithstanding the words "*to be begotten*," the devise could apply only to the children born before the testator's death, as those words might be satisfied by letting in the children born after the date of the will before the death of the testator; but the Court of K. B. (on a case from chancery) certified that all the nine children of Sarah Mogg, including five who were born after the death of the testator, took under the devise; and Sir W. Grant, M. R., expressed his concurrence in the certificate.

16. See Wms. Ex'rs (6th Am. ed.) 1174; the marginal note of the report, these Hawkins on Wills 70; 2 Redf. on Wills 13; Napier v. Howard, 3 Ga. 202; Ed- words are omitted. The case is deserv- dows v. Eddowes, 30 Beav. 603; Newill almost every rule regulating the class of children entitled under immediate and v. Newill, 12 L. R., Eq. 432. future devises.

(e) *Mogg v. Mogg*, 1 Mer. 654, 658. In

[And in *Gooch v. Gooch*, (*f*) where a testator devised lands to trustees in trust "during the lives and life of the survivor or longest liver of all the children which his daughter A hath or shall have," to apply the rents for the support of A and "of all her children which she shall from time to time have living;" and when his grandchildren, the children of his said daughter, should have attained the age of twenty-one, the testator directed the rents to be paid among the said children, and the issue of such as should die leaving issue, and the survivors and survivor of them, during the life of the longest liver of the said children; Sir J. Romilly, M. R., on the authority of *Mogg v. Mogg* (in which he expressed his concurrence,) held that children born after the death of the testator were entitled under the trust for children during the minority of the youngest. He also *held, however, that the time up to which such after-born children were admissible was, not the death of A, but the period when the youngest child for the time being attained the age of twenty-one years: upon the special ground (besides a variety of expressions tending to the same conclusion) that the will had provided for the event of the youngest child attaining that age in the lifetime of A, and that it was inconsistent with the provision that it should in all events remain a matter of uncertainty until the death of A which was or might be her youngest child. This decision was affirmed on both points by Lord Cranworth.]

This rule of construction, however, does not apply to general pecuniary legacies, where the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable,) until the death of the parent of the legatees.

Distinction in regard to general pecuniary legacies.

Thus, in *Storrs v. Benbow*, (*g*) where a testator bequeathed £500

[(*f*) 14 Beav. 565, 3 D., M. & G. 366.]

(*g*) 2 My. & K. 46 [affirmed 3 D., M. & G. 390, and *Townsend v. Early*, 28 Beav. 429, 3 D., F. & J. 1 (same will).] See also *Butler v. Lowe*, 10 Sim. 317. [In *Defflis v. Goldschmidt*, 19 Ves. 566, 1 Mer. 417, it was admitted (improperly as it now appears) that legacies to each of the children of the testator's sister "whether born or hereafter to be born," would include every child whenever born, unless the will showed a contrary intention; and proceeding on that admission Sir W. Grant held that this contrary

intention had not been shown; and he relied on the provision that if the sister should die before all her children had attained twenty-one, the interest of the legacies provided for such children as should be under age, or a competent part thereof, should be applied in their maintenance; whereby he considered that the testator had shown that in his view she could not die leaving any child who would not be entitled to maintenance, and consequently to a legacy. But in *Butler v. Lowe*, 10 Sim. 317, a similar provision was disregarded.]

"to each child *that may be born* to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship;" Sir J. Leach, M. R., held, that the gift was confined to children living at the testator's death. He thought that the words "*may be born*," provided for the birth of children between the making of the will and the death of the testator; and observed, that to give a different meaning to the words would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of his brothers' children. (*h*)

*It seems to be established, too, that the expression *children to be born* or *children to be begotten*, when occurring in a gift, under which *some* class of children born after the death of the testator would, independently of this expression of futurity, be entitled, so that the words may be satisfied without departing from the ordinary construction, that construction is unaffected by them.

—and cases where distribution is otherwise postponed.

(*h*) The reason last assigned by the M. R. is the only one which characterizes this class of excepted cases. The former argument would apply equally to cases within the general rule stated *ante* p. *178. [It has indeed been suggested that these excepted cases furnish the general rule, from which *Mogg v. Mogg* and *Gooch v. Gooch*, as relating only to real estate, are themselves the exception, *Dias v. De Livera*, 5 App. Cas. 134, 135. No reason is given why there should be any such distinction between real and personal estate, unless a vague allusion to the feudal system was so intended. A distinction derived from this source would, however, tell the other way, since feudal law accelerates the vesting of estates and (by consequence) the ascertainment of classes.

Sprackling v. Ranier, 1 Dick. 344, was also cited (5 App. Cas. 133) as a "direct authority" that the words in question do not enlarge the class. But in that case the gift was to G. for life, and afterwards to his sons and daughters, and their children, if any then dead, equally, *per stirpes*;

and if G. should die without issue, then to the sons and daughters of M., lawfully begotten or to be begotten, and their children, in case any of them should be then dead leaving issue, equally, *per stirpes*. G. died without issue in the testator's lifetime. At the death of G., M. had three children, and after the testator's death gave birth to a fourth. It was held by Sir T. Clarke, M. R., that only such of the children of M. as were living at the death of G. were entitled. "The court (he said) will sometimes extend the words '*then living*' to those living at the time of the will, but never further than the death of the testator." It is plain, therefore, that the decision turned on the word "*then*" tying down the class to the death of G., and that the case has no bearing upon the question under consideration.

It is true that *Butler v. Lowe* was treated by Sir L. Shadwell as a case within "the general rule;" but, having regard to the argument in that case, this must have meant "the general rule respecting distinct legacies."

Thus, in *Paul v. Compton*,⁽ⁱ⁾ where a testator bequeathed the residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her "to provide for such child or children as may *hereafter be born* of my said two daughters;" and, in default of such disposition, then in trust for the children of the daughters; Lord Eldon held that this power to the wife did not authorize her to appoint to children *not born in her lifetime*.

Construction of a future gift not varied by words "to be born;"

So, in *Whitbread v. Lord St. John*,^(k) he decided that a bequest unto and among the child and children of A born *and to be born*, as many as there might be, *when and as they should attain their age of twenty-one years or be married* with consent, was confined to his children living at the death of the testator and those who afterwards came *in esse* before the first share vested in possession, according to the rule before adverted to.^(l)

*[So, in *Parsons v. Justice*,^(m) where the gift was to A for life, and after her death to all the children of B who should be living at the testator's death or be born afterwards who should attain twenty-one; it was held by Sir J. Romilly, M. R., that the class was to be ascertained on the happening of the latter of the two events, viz., the eldest child attaining twenty-one and the death of A, and that no child born after the death of A, which happened last, could participate. This decision is the more emphatic because the will contained a provision that "no child attaining twenty-one should be excluded from his share in consequence of any other child or children having previously attained a vested interest in his share or shares, but that each child attaining in B's lifetime a vested interest in his share should thenceforth *during B's life* be entitled to receive the whole income of his vested share for the time being, subject to the contingent right of any after-born child to such vested share."]

—nor by the words "to be born after my death."

But if the bequest is to "such children as shall hereafter be born

It may be added that *Dias v. De Livera* did not, and could not, raise the precise point. That case turned on the construction of a mutual will, executed by husband and wife according to the Roman-Dutch law of Ceylon, and operating at different times on the different moieties of the joint property; a very different in-

strument from an English will.]

(i) 8 Ves. 375.

(k) 10 Ves. 152.

(l) See *ante* p. *160. [In *Eddowes v. Eddowes*, 30 Beav. 603, the bequest was not so confined: *Whitbread v. St. John*, however, was not cited.

(m) 34 Beav. 598.]

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during the lives of their respective parents," of course this construction is excluded by the express terms of the will, and all the after-born children will be let in, whether born before the period of distribution (*n*) or not.

It has been decided, too, that the words "which shall be begotten," Do not confine devise to future children. or "to be begotten," annexed to the description of children or issue, do not *confine* the devise to future children; but that the description will, notwithstanding these words, include the children or issue in existence before the making of the will. (*o*) ¹⁷

This doctrine is as old as the time of Lord Coke, who says, (*p*) that as *procreatis* shall extend to the issues begotten *afterwards*, so *procreandis* shall extend to the issues begotten *before*. [And in *Almack v. Horn*, (*q*) where a testator devised real estate to his daughter A, a widow, and his granddaughter B, and the survivor for life, remainder to all the children of A and B lawfully to be begotten as tenants in common in tail; B was the only child of A; but notwithstanding this, (*r*) and the apparently future import of the expression "to be begotten," it was held by *Sir W. P. Wood, V. C., that she was entitled with her own children to share in the remainder; the correct view in his opinion being that the expression had no reference at all to time, put merely pointed out the *stirps*.]

And it seems that even the words "*hereafter* to be born" will not exclude previously-born issue; (*s*) [a construction first "Hereafter to be born," does not exclude existing children. applied to cases (though not now confined to them) where the word heirs or issue, to which the phrase in question

(*n*) *Scott v. Earl of Scarborough*, 1 Beav. 156.

(*o*) *Doe d. James v. Hallett*, 1 M. & Sel. 124. See the same principle applied to a deed, *Hewet v. Ireland*, 1 P. W. 426 [2 Coll. 344, n.]

17: See, too, *Prowitt v. Rodman*, 37 N. Y. 42, affirming 3 Barb. 385, where a remainder at A's death to the "children of B lawfully to be begotten then living," was held to include children already begotten; and to the same effect is *Almack v. Horn*, 1 Hemm. & M. 630. See also *Theobald on Wills* 139. But in *Burke v. Wilder*, 1 McCord Eq. 551, a particular child then *en ventre* was held to be intended by the words "to be born" in a

gift of residue to "my children now born or to be born," after other special provisions made for his children then living and the child then *en ventre*, and a later posthumous child was not included.

(*p*) Co. Lit. 20 b.

(*q*) 1 H. & M. 630.

(*r*) See analogous cases upon gifts to next of kin, *ante* p. *131.]

(*s*) *Hebblethwaite v. Cartwright*, Cas. temp. Talb. 31; which seems to overrule the position of Lord Hale, that the words "*in posterum procreandis*" exclude sons born before, on account of the peculiar force of "*in posterum*," Hal. MSS. cit. Co. Lit. 20 b, n. 3; 3 Leon. 87.

was added, was a word of limitation, not giving an estate by purchase to any other person than to him whose heirs were mentioned; and this] Lord Talbot said was to prevent the great confusion which would arise in descents by letting in the younger before the elder. But, as a rule of construction, it must be founded on presumed intention; it supposes that the testator, by mentioning future children, and them only, does not thereby indicate an intention to exclude other objects, and in this view is certainly an exception to the maxim, *expressio unius est exclusio alterius*.

[In a case (t) where by a codicil a testatrix revoked a legacy given by her will to her sister A, and gave a like sum in trust for her during her life, and after her death for "the child or, if more than one, for all and every the children of A, whether by her *present or any future* husband," it was held by Sir W. P. Wood that a child, who was the only child of A by a former husband (who was dead at the date of the will) was entitled. "Neither internally nor externally," said the V. C., "was there any evidence of an intention to exclude this child by a former husband. The testatrix who had by her will given the legacy to her sister absolutely, revoked by codicil the absolute gift, and after giving her a life interest, introduced the provision for the children. She knew that her sister had one child living. There might be more, and it was immaterial to her whether those others should be by the present or any future husband of her sister." (u)]

*Sir W. Grant thought, (v) that a gift over, in case certain persons "shall happen to die in my lifetime," though strictly importing futurity, might be understood as speaking of the event at whatever time it may happen, whether before or after the will; [applying the rule that the prior limitation being, by what means soever, out of the case, the subsequent limitation takes place.

[(t) In re Pickup's Will, 1 J. & H. 389.]

(u) Compare the principle of these cases with that of Shuldham v. Smith, 6 Dow. 22, ante p. *822. The cases in the text strongly exemplify the anxiety of the courts to avoid giving devises to children, an operation that will restrict them to certain classes of children. See judgment in Matchwick v. Cock, 3 Ves. 611, where after-born children were admitted to participate in a provision for maintenance

out of income in favor of "children" generally, though the disposition of the property itself, out of which the income was to arise (and the objects of which, it might be presumed, were intended to be the same as those of the maintenance provision,) was confined to the existing children. [Freemantle v. Taylor, 15 Ves. 363.]

(v) In Christopherson v. Naylor, 1 Mer. 326. [See also In re Sheppard's Trust, 1 K. & J. 269.]

But the context may require expressions of this kind to be construed strictly as importing time future. Thus, in *Early v. Benbow*, (w) where a testator gave legacies of £500 each to A, B, C and D, four of the grandchildren of his brother Henry, and by a codicil bequeathed £500 "to each child *that may be born* to either of the children of either of my brothers lawfully begotten:" it appeared that at the date of the codicil and of the testator's death, there were living, to his knowledge, several grandchildren of his brothers besides A, B, C and D, (and for whom no provision was made except by the codicil,) and several children of brothers, one at least of which brothers survived the testator. Under these circumstances, Sir J. K. Bruce, V. C., held that neither of the legatees named in the will was intended to take any benefit by the codicil so as to give double legacies; and appeared to entertain an opinion equally adverse to all grandchildren living at the date of the codicil, although not named. Sir J. Romilly, M. R., before whom the latter point was afterwards argued, (x) decided it in conformity with that opinion: he thought it was concluded in principle by the previous decision, in which he concurred. And both decisions were upheld by the Court of Appeal.] (y)

The preceding citation from Lord Coke has anticipated the observation (which properly finds a place here,) that a gift to children "born" or "begotten" will extend to children coming *in esse* subsequently to the making of the will, 18 and even after the death of the testator, where, the time of distribution under the gift being posterior to that event, the gift would by the general rule of construction include such after-born children.

Thus, where (z) a testator bequeathed certain funds to trustees in trust for his wife for life; and, after her decease, in trust to transfer the same unto and among all and every the child and *children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband; Sir J. Leach, V. C., held that the bequest comprehended [children born after the death of the widow,

(w) 2 Coll. 342. And see *Wilkinson v. Adam*, 1 Ves. & B. 422, 468.

(x) *Early v. Middleton*, 14 Beav. 453.

(y) *Townsend v. Early*, 1 D., F. & J. 495.
1, affirming 28 Beav. 428.]

18. See *Theobald on Wills* 139; *O'Hara on Int. of Wills* 295.

(z) *Browne v. Groombridge*, 4 Mad.

i. e. it is presumed (for she died before the testator) in the interval between her death and his.]

So, in *Ringrose v. Bramham*, (a) children born in the interval between the making of the will and the death of the testator were let in under a bequest to A's children; "£50 to every child he *hath* by his wife E., to be paid to them by my executors as they shall come of age." It was even contended that the bequest extended to children born after the death of the testator and before the majority of the eldest; and Sir R. P. Arden rested his objection to this construction, not solely on the force of the word "*hath*," but on other grounds; particularly that it would have the effect of postponing the distribution of the general residue, until the number of pecuniary legatees could be ascertained.

Legacy to every child E. *hath* extended to future children.

It is not to be inferred, however, that because the courts in the preceding cases have refused to allow the claims of after-born children to be negatived by expressions of a loose and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent: as in the instance of a gift to children "*now living*," which we have seen is confined to children in existence at the date of the will. (b) [And effect has sometimes been given to the word "*born*" or "*begotten*" by considering it as intended to apply to objects not strictly or *prima facie* included in the class, where otherwise the word would have been inoperative. (c)]

And here it may be observed that, under a devise to children *born* at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period. (d) But it is otherwise, of course, if the gift is to children *living* at the time. In *Fox v. Garrett*, (e) where the gift was to A for life, and if he should die (as he did) *without children, then to the children of B and C, who should be living at the decease of himself, the testator, and A; it was held

Gift to children *born* at a time named: they need not survive.

(a) 2 Cox 384. [See also *Doe d. Burton v. White*, 1 Ex. 526, 2 Ex. 797, where, however, the only question was whether an immediate gift to "*children who have issue*," included children who had no issue until after testator's death; and it was held that it did not, but meant "*have*

at testator's death."]

(b) *Vide ante* ch. X.

[(c) See next chapter.

(d) *Paterson v. Mills*, 18 L. J., Ch. 449, 14 Jur. 126.

(e) 28 Beav. 19.]

that this meant living at the death of the survivor of the testator and A.]

II. 6.—It should be observed, that in the application of the preceding rules, and, indeed, for all purposes of construction, a child *en ventre sa mere* is considered as a child *in esse* ¹⁹ [if it will be for its own benefit to be so considered.] This was finally established in *Doe v. Clarke*, (*f*) which was an ejectment directed by Lord Thurlow, in consequence of a difference of opinion between himself and Sir L. Kenyon, M. R., on the claim of a posthumous child under a gift to all the children of C who should be *living* at the time of his death; the former maintaining the competency, and the M. R. the incompetency, of the child *en ventre sa mere* to take as a “living” child. (*g*)

The case of *Clarke v. Blake* afterwards came before Lord Lough-

19. Wms. Ex'rs (6th Am. ed.) 1172; 2 Redf. on Wills 10; Flood on Wills 517; Hawkins on Wills 79; Theobald on Wills 145; Hall v. Hancock, 15 Pick. 255; Stedfast v. Nicoll, 3 Johns. Ch. 18; Marsellis v. Thalhimier, 2 Paige Ch. 35; Jenkins v. Freyer, 4 Paige Ch. 47; Hone v. Van Schaick, 3 Barb. Ch. 488; Barker v. Pearce, 30 Penna. St. 173; Gross' Estate, 10 Penna. St. 361; Swift v. Duffield, 5 Serg. & R. 38; McKnight v. Read, 1 Whart. 213. In this case it was held that a posthumous child would not take against his own interest under a devise to “children who may be *living* at the time of my death.” See also Picot v. Armistead, 2 Ired. Eq. 226; Petway v. Powell, 2 Dev. & Bat. Eq. 312; Burke v. Wilder, 1 McCord Eq. 551; Groce v. Rittenberry, 14 Ga. 234; Smart v. King, Meigs (Tenn.) 149; so a devise over on death of first taker “without issue *then living*” fails, if there be a child *then en ventre*, Laird's Appeal, 85 Penna. St. 339. See, too, Townsend v. Early, 3 De G., F. & J. 1 (1860); Crook v. Hill, 3 L. R., Ch. Div. 773 (1869); in this case Hall, V. C., says, “It is the general rule that a child *en ventre sa mere* comes within the

expression ‘child or children’ and is included in a trust in favor of children, whether described as children *in esse*, living at the death, begotten and to be begotten, begotten and born or in any other similar way;” see, too, Pearce v. Carrington, 8 L. R., Ch. App. 969 (1870). In *Armistead v. Dangerfield*, 3 Munf. 20, a child *en ventre* was held not to be included in a gift to children, contrary to the above decisions; and in *Starling v. Price*, 16 Ohio St. 32, to children “*now living*.” And in *Jones v. Emery*, 3 L. R., Ch. Div. 300, where the gift was to the three children of A, and A had three children living and a fourth *en ventre*, the latter was held not to be included.

(*f*) 2 H. Bl. 399.

(*g*) *Clarke v. Blake*, 2 B. C. C. 321; (overruling *Pierson v. Garnett*, 2 B. C. C. 47; *Cooper v. Forbes*, Id. 63; *Freemantle v. Freemantle*, 1 Cox 248.) [The child *en ventre* is supposed to be actually born at the period of distribution; if on that supposition he would have been illegitimate, as, if his mother is then unmarried, he will not take, although the mother may be married before his actual birth, In re Corlass, 1 Ch. D. 460.]

borough, (*h*) on the equity reserved, and, in conformity to the decision of C. P., he held the posthumous child to be entitled. Indeed so completely is the point now set at rest, that the claim of a child *en ventre sa mere* under a bequest "to the child and children begotten and to be begotten on the body of A, who should be *living* at B's decease," was admitted *sub silentio* in the much-discussed case of *Mogg v. Mogg*. (*i*)

It being thus settled that children *en ventre* were entitled under the description of children *living*, the only doubt that remained, was whether they would be held to come under the description of children *born*; and that question also has been decided in the affirmative. (*k*) The result then is to read the words "living," and "born," as synonymous with *procreated*; and, to support a narrower signification of such terms, words *pointedly expressive of an intention to employ them in a special and restricted sense must be used.

Child *en ventre* entitled under description of children *born*.

[The rule of construction prevails wherever it makes the unborn child an object of gift, or of a power of appointment, (*l*) or prevents a gift to it, (*m*) or an estate otherwise vested in it, as by descent, (*n*) from being divested. But it is limited to cases where the unborn child is benefited by its application. Thus in *Blasson v. Blasson*, (*o*) where a testatrix directed a fund to be accumulated, and when the youngest of the children of A, B and C who should have been born and should be living at her death should attain twenty-one, to be divided among such of the children of A, B and C as should then be living: two children who were *en ventre* at the death of the testatrix were held by Lord Westbury not to be "born and living" at her death, because, although by holding them to be then born and living, the period of accumulation would have been extended,

Child *en ventre* is not considered *in esse* except for its own benefit.

(*h*) 2 Ves., Jr., 673.

(*i*) 1 Mer. 654. See also *Rawlins v. Rawlins*, 2 Cox 425. These cases demonstrate that the distinction laid down in *Northey v. Strange*, 1 P. W. 341, between a devise to children generally and to children living at a given period, with reference to the admission of children *en ventre*, is unfounded; nor would it have been deemed worthy of remark had not the case been cited (1 Belt's Ves. 113, editor's note) without an explicit denial of its au-

thority.

(*k*) *Trower v. Butts*, 1 S. & St. 181. See also *Whitlock v. Heddon*, 1 B. & P. 243.

[(*l*) In re *Farncombe's Trusts*, 9 Ch. D. 652.

(*m*) *Pearce v. Carrington*, L. R., 8 Ch. 969.

(*n*) *Burdet v. Hopegood*, 1 P. W. 485, and see other cases cited 1 S. & St. 182, 183.

(*o*) 2 D., J. & S. 665.]

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and the class of children consequently enlarged, that construction was not needed for the purpose of admitting the individuals who were *en ventre* to share in the fund.]

It should be observed, that in *Bennett v. Honeywood*, (*p*) Lord Apsley considered that the admission of children *en ventre* was confined to devises to children, and refused to let in such a child under a devise to relations. This decision does not appear to have been expressly overruled; but it is conceived that the present doctrine, and the principle upon which the late cases have proceeded, that a child *en ventre sa mere* is for all purposes a child in existence, and even *born*, conclusively negative any such distinction. (*q*)

[It has also been suggested, (*r*) that a child *en ventre* is not a child in existence for the purpose of applying the second branch of the rule in *Wild's case*, (*s*) according to which, if one devises land to A and his children, and A has children at the time of the devise, they take jointly with A. But the case did not require a decision on this point.]

*III. Sometimes questions arise on the construction of clauses substituting the children of legatees who die before the period of distribution or enjoyment.²⁰ Most of these questions

Clauses of substitution.

(*p*) Amb. 708.

[(*q*) See acc. Sugd. Pow. 653 (8th ed.) In re Gardiner's Estate, L. R., 20 Eq. 647, (gift to brothers and sisters,) is *contra*. The V. C. (Bacon) would even appear to have denied generally the doctrine that in applying the preceding rules a child *en ventre* is to be deemed *in esse*: *sed qu*.

(*r*) By Kelly, C. B., *Roper v. Roper*, L. R., 3 C. P. 32.

(*s*) *Post* ch. XXXVIII.

20. The following extract from Theobald on Wills, being chapter XXVIII. of that excellent work entire, is here inserted as a full and yet brief statement of the law as to substitutions, brought down to a very late date:

"Every executory limitation intended to destroy prior interests in certain contingencies is in the widest sense substitutional. The term is, however, generally

applied to limitations intended to provide for the death of prior legatees before the period of distribution. The simplest form of substitutional gift, introduced by the word 'or,' as for instance, to class A or class B, generally involves the relation of greater to smaller class, or of ancestor to descendant. It is, however, probable that a simple gift to A or B, would now be considered substitutional. See *Carey v. Carey*, 6 Ir. Ch. 255; see, however, *Longmore v. Broome*, 7 Ves. 128; *Miller v. Chapman*, 24 L. J., Ch. 409; *Maude v. Maude*, 22 Beav. 290. But a gift to A or B, or to A or his children, as C may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally. *Penny v. Turner*, 2 Ph. 493; *White's Trusts*, Joh. 656. When the contingency of surviving the period of distribution is applied both to the-

will be found in other parts of the present work, especially in a subsequent chapter, which treats of the period to which words providing

original and substituted class, if, for instance, the gift is to parents or their children living at the decease of the tenant for life, the gift will nevertheless be considered substitutional. *Congreve v. Palmer*, 16 Beav. 435; *Atkinson v. Bartrum*, 28 Beav. 219. In such a case, however, if there is anything to show that the original and substituted class are to take co-ordinately, 'or' will be read 'and.' *Richardson v. Spragg*, 1 P. Wms. 433, where the gift was to such of the testatrix's daughters, or daughters' children, as should be living at her son's death, 'without considering any superiority or eldership whatever.' *Shand v. Kidd*, 19 Beav. 310. And where the direction was to pay a sum of money after the death of a tenant for life, 'to all and every the testatrix's nephews and nieces, to wit, A or her children, B or her children,' etc., to be equally divided between them, 'or' was read 'and,' the words under the *vide licet* being only an expanded description of the persons to take. *Eccard v. Brooke*, 2 Cox 213. So, too, where the gift is to such of several persons as should be living at the testatrix's decease, or the issue of such of them as should be married, 'or' will be read 'and.' *Horridge v. Ferguson*, Jac. 583.

"Upon the same principle, a gift to children living at the period of distribution, or *their* issue, will be construed as a gift to children then living, and the issue of those then dead. *King v. Cleveland*, 4 De G. & J. 477; *Philp's Will*. 7 Eq. 151; *Burt v. Hillyar*, 14 Eq. 160.

"A substitutional gift, substituting one set of legatees for others dying before the period of distribution, must be distinguished from an executory gift over intended to take effect any time. Thus, a gift to children living at a particular time, with a gift over, if any *such* children die leaving issue, to their issue, is

an executory limitation to take effect at any time. *La Roche v. Davies*, 3 Y. & C. Ex. 612, n.; *Ex parte Hunter*, 3 Y. & C. Ex. 610; *Howes v. Herring*, 1 McCl. & Y. 295. On the other hand, if the gift is to children living at the period of distribution, with a gift to their issue, if any such children die before becoming entitled, the gift to the issue will be construed as substitutional, since children, living at the period of distribution, could not die without becoming entitled. *Jeyes v. Savage*, 10 Ch. 555; see *Giles v. Giles*, 8 Sim. 360.

"A substitutional gift must further be distinguished from those cases where an absolute gift is directed to be settled upon the donee for life, with remainder to his children. In the latter case the whole gift will fail by the death of the donee before the testator. *Stewart v. Jones*, 3 De G. & J. 532; *Whitcher v. Penley*, 9 Beav. 477. On the other hand, a substitutional gift will take effect, though the original donee dies before the testator. Thus a direct gift to A or his children goes to A if he survives the testator and to his children if he does not. *Montagu v. Nucella*, 1 Russ. 165; *Salisbury v. Petty*, 3 Ha. 86. Similarly, if there is a life interest, and then a gift to A or his children, the substitutional gift takes effect whether A dies in the lifetime of the testator or the tenant for life. *Girdlestone v. Doe* 2 Sim. 225; *Porter's Trusts*, 4 K. & J. 183; *Habergham v. Ridehalgh*, 9 Eq. 395; *Hobgen v. Neale*, 11 Eq. 48.

"As to the effect of the death of some of the original legatees before the testator: It is settled that where the gift is to a class of parents, with a substitutional gift to the children of parents dying before the period of distribution, children of parents who die after the date of the will, and before the testator, will take. *Smith v. Smith*, 8 Sim. 353; *Jones v. Fre-*

against the death of a prior devisee or legatee, coupled with a contingency, are to be considered as referring. (t) But there is one point

win, 12 W. R. 369, 3 N. R. 415; Re Hotchkiss' Trusts, 8 Eq. 643; Habergam v. Ridehalgh, 9 Eq. 395. Though of course, if the original gift is to a class living at the testator's death, or at some other period, and the substitutional gift is expressly confined to the children of such persons, the substitution can have no effect with regard to those who never become members of the original class. See *Shergold v. Bone*, 13 Ves. 370; *Smith v. Farr*, 3 Y. & C. Ex. 328.

"Where there can be substitution in respect of legatees dead at the date of the will:

"1. When there is a gift to several persons *nominatim* with a substitution of their issue in the event of their death, the fact that one of the persons so named is dead at the date of the will will not prevent his issue from taking. *Hannam v. Simons*, 2 De G. & J. 151; *Ive v. King*, 16 Beav. 46; *Hobgen v. Neale*, 11 Eq. 48; see *Barnes v. Jennings*, L. R., 2 Eq. 448.

"2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is whether the issue take a share which has been given to a parent who is contemplated as capable of taking under the will, or whether they take a share which has not been previously given to their parent. In the former case, issue of parents dead at the date of the will will not take, in the latter they will. The important point is not whether the gift itself is substitutional, but whether the interests of persons who are contemplated as capable of taking under the will, are given in the event of their death to substituted legatees. Thus, though a gift to such of a class as may be then living, or the issue of any then dead, is strictly substitutional, the issue, if they take at all, take original shares, since nothing is

given to parents then dead. *Atwood v. Alford*, L. R., 2 Eq. 479. In the same way a gift to parents 'then living,' and the issue of those then dead, is a direct substantive gift to the issue. *Smith v. Smith*, 5 Ch. 342; *Martin v. Holgate*, L. R., 1 H. L. 175; see *Ashling v. Knowles*, 3 Dr. 593; *Etches v. Etches*, 3 Dr. 447.

"a. If the gift is to parents and issue in one continuous sentence—as, for instance, to children then living, and the issue of those then dead—the issue of parents deceased at the date of the will take, though the issue may be directed to take only a parent's share, as this direction will be satisfied by a stirpital distribution. *Tytherleigh v. Harbin*, 6 Sim. 329; *Rust v. Baker*, 8 Sim. 443; *Bebb v. Beckwith*, 2 Beav. 308; *Coulthurst v. Carter*, 15 Beav. 421; *Faulding's Trusts*, 26 Beav. 263; *Philp's Will*, 7 Eq. 151; *Heasman v. Pearse*, 7 Ch. 275. But if the gift is to my children then living, and the children of such of my *said* children as shall be then dead, the testator by using the term 'said children' shows that he is contemplating a class of children living at the date of the will, and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted. Re *Thompson's Trust*, 2 W. R. 218, 5 D., M. & G. 280; *Peel v. Catlow*, 9 Sim. 372; *Smith v. Pepper*, 27 Beav. 86. On the other hand if the gift is to brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. Re *Jordan's Trust*, 2 N. R. 57; see *Jarvis v.*

[(t) Ch. XLIX.; also ch. XXXII., § 1, *ad fin.*; ch. XL.]

which it is convenient to notice in this place, because [at one time the authorities were conflicting, some of them maintaining] a construction

Pond, 9 Sim. 549. If the children are expressed to be the children of parents, who are beneficiaries under the will; if, for instance, the bequest is to 'my daughters and their children,' the children of a daughter dead at the date of the will take nothing. *Parker v. Tootal*, 11 H. L. 143; see *Crook v. Whitley*, 26 L. J., Ch. 350; but see *Clay v. Pennington*, 7 Sim. 370.

"b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the class dead at the date of the will, will not take. *Congreve v. Palmer*, 16 Beav. 435. If, however, none of the members of the original class are alive at the date of the will, or if the original is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gowling v. Thompson*, 11 Eq. 366; see *Barnaby v. Tassel*, 11 Eq. 363.

"c. Where the gift to the issue is in an independent clause, the question is whether the intention is to add fresh members or substitute them for the original class. If the gift is to children living at the testator's death, with a direction that if any should happen to die in his lifetime, the 'legacy' intended for such child should be for his issue, the word *legacy* shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson v. Naylor*, 1 Mer. 320; *Hunter v. Cheshire*, 8 Ch. 751. It may be doubted whether *Phillips v. Phillips*, 13 W. R. 170, 10 Jur. (N. S.) 1173, and *Parsons v. Gulliford*, 10 Jur. (N. S.) 231, can stand with these authorities. So, if there is no direct gift to issue, but only a direction that issue of parents dying are to stand in the place of their parents, or to take their parents' share. *Butler v. Ommaney*, 4 Russ. 71; *Gray v. Garman*, 2 Ha. 268;

Atkinson v. Atkinson, L. R., 6 Eq. 184; *Re Hotchkiss' Trusts*, 8 Eq. 643; *Habergham v. Ridehalgh*, 9 Eq. 395.

"On the other hand if the original gift is to a class, with a direction, that the issue of any dying in the testator's lifetime, or before the period of distribution, should take the share their parents would have been entitled to if then living, the issue of those dead at the date of the will will be admitted, as the direction amounts to an independent gift, the word share being satisfied by a stirpital distribution. *Loring v. Thomas*, 1 Dr. & S. 497; *Chapman's Will*, 32 Beav. 382; *Adams v. Adams*, 14 Eq. 246.

"In these cases it is not the share of the parents, or the share the parents are entitled to which is given to the issue, but the share the parent would have been entitled to. In *re Potter's Trusts*, 8 Eq. 52, is a more difficult case, since there the gift was to nephews and nieces, and in case of the death of any of his *said* nephews and nieces leaving issue, such issue to take the share their parents would have taken if living, the word *said* showing that the testator referred to nephews and nieces capable of taking under the will. See *Re Thompson's Trust*, 2 W. R. 218, 5 D., M. & G. 280. Perhaps issue of parents dead at the date of the will would not be admitted where other express provision is made for such issue. *Waugh v. Waugh*, 2 M. & K. 41. And where the gift is to children living at the decease of the tenant for life, followed by a direction, that if any *such* children should be dead before the tenant for life and leave issue, their issue should be entitled to the share of a child dying before the tenant for life, this is in effect a substantive gift to the issue; since only children surviving the tenant for life are members of the original class, and

which seemed to be hardly reconcilable with the principles of analogous cases, and to be peculiar to clauses of substitution in favor of

the word *such* is inaccurately used. *Giles v. Giles*, 8 Sim. 360; see *Jarvis v. Pond*, 9 Sim. 549.

"Whether the contingency of the original gift attaches to the substituted gift. Where there is a life interest followed by a contingent gift to certain persons, and a gift, if they die before the contingency, to their children, the contingency attaching to the gift to the parents does not attach to that to the children, and the children take vested interests, although they may not survive the contingency upon which the gift to the parents was to take effect. For instance, if the bequest is to A for life, then to such of my nephews as may be then living, and the children of such as may be then dead, the children take vested interests upon their parents' death, whether they survive A or not.

"1. This is clearly settled if the children take original shares. *Martin v. Holgate*, L. R., 1 H. L. 175; *Re Orton's Trust*, 3 Eq. 375; *Burt v. Hillyar*, 14 Eq. 160.

"2. But if the gift to the children is substitutional, there appears to be some difficulty. On the whole, the current of recent authority seems to be in favor of the same rule in the case of substitutional as of original gifts. *Masters v. Scales*, 13 Beav. 60; *Re Turner*, 34 L. J., Ch. 660; *Lanphier v. Buck*, 2 Dr. & Sm. 484; *Merrick's Trusts*, L. R., 1 Eq. 551. But a difficulty is created by the case of *Pearson v. Stephen* in the House of Lords, 5 Bl. (N. S.) 203. There there was a gift to S. during coverture, and upon the death of her husband in her life to her absolutely, but if her husband should survive her, then to the testator's five sons and their respective issue *per stirpes* and not *per capita*, and it was held that in the event of S. dying in her husband's life, the sons of the testator living at such event would be absolutely entitled, but if

any of the sons should die in the lifetime of S. leaving issue, such issue, if living at the death of S., would be entitled to the share their parents would have taken; but see the remarks of Kindersley, V. C., on this case in *Lanphier v. Buck*, 34 L. J., Ch. 659.

"3. There is, however, this difference between a substitutional and original gift to the children, that, in the former case, only those children who survive the parents will take, while in the latter all the children will take, whether they survive the parents or not; but see *Humfrey v. Humfrey*, 2 Dr. & Sm. 129. 'The substitution takes place at the death of the nephew or niece. And then I see very good ground for saying, there, by reason of its being substitution, you will not substitute dead people for the nephew or niece who has been living up to that time and has then just died.' *Lanphier v. Buck*, 2 Dr. & Sm. 484, 34 L. J., Ch. 657; *Re Turner*, 34 L. J., Ch. 660; *Merrick's Trusts*, L. R., 1 Eq. 551; *Thompson v. Clive*, 23 Beav. 282; *Crause v. Cooper*, 1 J. & H. 207; *Bennet's Trusts*, 3 K. & J. 280; *Hurry v. Hurry*, 10 Eq. 346; *Hobgen v. Neale*, 11 Eq. 48; *Heasman v. Pearse*, 11 Eq. 532, 7 Ch. 275.

"Whether the original and substituted class are mutually exclusive: When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class. It is clear that if all the original class survive the period of distribution they alone take. *Sparks v. Restal*, 24 Beav. 218; *Margetson v. Hall*, 10 Jur. (N. S.) 89, 12 W. R. 334. So, if none of the

children. The point occurs where children are substituted for legatees dying before a given period (usually the period of distribution,) without any express requisition that the children thus substituted shall survive such period: and the question is, whether the substituted gift is by necessary intendment to be construed as applying only to such issue as may happen to be living at such period, or whether the issue surviving the parents are absolutely entitled; in other words, whether the gift to the issue is by implication subject to the same contingency of survivorship as the gift to the parents.²¹ The prevalent notion

Whether shares of children are by necessary implication subject to the same contingency as their parents.

original class survive the period of distribution, the substituted legatees alone take. *Willis v. Plaskett*, 4 Beav. 208; *Timms v. Stackhouse*, 27 Beav. 434; *Bolitho v. Hillyar*, 34 Beav. 150; *Attwood v. Alford*, L. R., 2 Eq. 479.

"But if some of the original class die leaving children and others survive the period of distribution: If the gift is to several persons *nominatim* as tenants in common or their children, those who survive the period of distribution take, together with the children of those who die before it. *Price v. Lockley*, 6 Beav. 180. In the case, however, of a simple substitutional gift to children or legal issue to be divided amongst them in equal shares after the death of their parents, it was held that the issue of a child dying after the testator and before the period of distribution, could not take with the other children. *Holland v. Wood*, 11 Eq. 91. But in that case the substitution probably referred to the death of the testator, the period of division only being postponed, so that it is not, perhaps, an authority precisely in point. See *Blundell v. Chapman*, 12 W. R. 540; *Attwood v. Alford*, L. R., 2 Eq. 479. *Gowling v. Thompson*, 19 L. T. (N. S.) 242; *Finlason v. Tatlock*, 9 Eq. 258.

"How the class of substituted legatees is to be ascertained, when the gift is to A for life, then to B or his issue:

"1. If B dies in the testator's lifetime, the class is ascertained at the testator's

death. *Ive v. King*, 16 Beav. 46.

"2. If B survives the testator and dies in the lifetime of the tenant for life, the class is ascertained at B's death. *Ive v. King*, 16 Beav. 46; *Hobgen v. Neale*, 11 Eq. 48.

"And the class will be definitely ascertained at those periods, and will not open to let in issue born afterwards and before the period of distribution, on the principle that a person to take by substitution must be alive at the time when the substitution takes place. *Hobgen v. Neale*, *supra*."

21. In *Pell's Trusts*, 3 Giff. 152, it was held that a remainder, after life estate to widow, "to my seven children (by name) or such of them as shall be living at the death of my said wife and the issue of such of them as shall be then dead leaving issue," included the issue of a child who died after testator, in the lifetime of the widow, although the said issue afterwards died before the widow. So in *Re Applebee*, 21 W. R. 290, 28 L. T. R. (N. S.) 102 (1873), where the parents were to take at the age of twenty-one, the contingency as to age did not extend to the issue taking parents' share by substitution. But in *Holgate v. Jennings*, 34 Beav. 79, the contrary was held in a gift for life to the widow, with remainder to nephews *living at the time of her death*, and "if any should be then dead leaving issue," to such issue, and the issue were required to survive the widow, those who did not

before any adjudication on the subject, seems to have been, that in such cases it was not allowable to engraft on the gift to the issue an implied qualification, in order to assimilate their interest to that of their parents; and this strictness of construction was considered to be warranted by the apparently analogous cases establishing that accruing shares are not, by necessary implication, subject to clauses of accruer which the testator has in terms applied to original shares only; there being, it is thought, no such irresistible inference that the testator has the same intention in regard to original and the accruing shares, as to supply the defect of expression. The application of this strict rule [was, however, supposed] to defeat the probable intention, and the more liberal construction was sometimes adopted of extending to the

being excluded. As to this question, see also the remarks of Mr. Theobald cited in the next preceding note, and the cases there referred to.

"When there is a gift to the members of a class for their lives, with remainder to their children, the death of a member of the class in the lifetime of the testator after the date of the will will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take," Theobald on Wills 140; *Habergham v. Ridehalgh*, 9 L. R., Eq. 395; see, too, *Flood on Wills* 492; *Wood's Will*, 31 Beav. 323, in which case children of testator's brothers and sisters deceased before the date of the will, could not take under a gift to "my brothers and sisters or their children." But in *Parsons v. Gulliford*, 10 Jur. (N. S.) 231, a gift to "my nephews," and if either "die in my lifetime leaving lawful issue," to such children, included children of a nephew who had died before the making of the will; and to the same effect are *Potter's Trusts*, 8 L. R., Eq. 52; *Hall v. Woolley*, 18 W. R. 129, and *Re Sibley*, 5 L. R., Ch. Div. 494; *Malins, V. C.*, in *Potter's Trusts*, criticising the adverse case of *Christopherson v. Naylor*, 1 Mer. 320, and saying, "Whenever there is a

gift to a class with a gift by substitution to the issue or children of those who shall die, the children take what their parents would have taken if living at the testator's death without regard to the question whether their parents died before or after the date of the will, unless a contrary intention is shown." This case, and also the cases of *Loring v. Thomas and Chapman's Will*, cited by Mr. Theobald in preceding note, are distinguished by *James, V. C.*, in *Hotchkiss' Trusts*, 8 L. R., Eq. 643, from that case, as being really original gifts to two classes: one class of children, or nephews (living), and another class of issue of other children, or nephews (deceased), saying: "I think *Christopherson v. Naylor* still to be an authoritative case, established if necessary by a recent recognition of it by the Lord Chancellor when sitting as Lord Justice so lately as on the 8th day of June 1868 in *Gowling v. Thompson*, 19 L. T. R. (N. S.) 242. That I set off against the express overruling of the case by Vice Chancellor *Malins* in *Re Potter's Trusts*." See, too, *Atkinson v. Bartrum*, 28 Beav. 219, where a gift in remainder, after the death of A and B, "to my surviving brothers and sisters or their children," went to those children only who survived both the life-tenants A and B, and their own parents.

children the qualification affecting the shares of the original objects of gift. (*u*)

*[It is probable, however, that the testator does not contemplate the precise event, and “a judge is not justified in departing from the plain meaning of words which admit of a rational interpretation, for the purpose of giving effect to an assumed intention, which appears to him to be more rational, or more consistent with the rest of the will.” (*x*) Moreover, it is not clear that the testator’s real intention was carried into effect by the construction adopted in those cases. “It is said,” observed Sir W. P. Wood, V. C., (*y*) “that there is no satisfactory reason why a condition of survivorship should attach to a parent and not to a child—a remark with which I cannot altogether agree, for there is very considerable difference in the positions of the parents and their issue. It is intelligible that a gift to children should be limited to those who survive the tenant for life, there being a gift over to their issue; but in the case of issue, why a share should be distributed among surviving issue, giving nothing to the representatives of those who may be dead, is not so clear. If all are to participate, any of them, in making arrangements on marriage, or otherwise, may rely upon this, that should he die before the share falls in, his family will take it. This observation does not apply to the case of children, under a condition that they must survive the tenant for life, with substituted gifts to issue, because, notwithstanding the condition of survivorship, their families are provided for. On the construction that would limit the issue entitled to those who survive the tenant for life, the objects of the testator’s bounty are placed in a position which is not such as the testator would desire. To these considerations must be added the inclination of the court to avoid the suspense of shares, as far as can be done consistently with the expressed intention, and to favor early vesting.”

These considerations were, in repeated instances, held to outweigh

[*u*] *Bennett v. Merriman*, 6 Beav. 360; see *Smith v. Palmer*, 7 Hare 229. *Turner v. Macgregor v. Macgregor*, 2 Coll. 192; *v. Sargent*, 17 Beav. 515, was an executory trust. *Penny v. Clarke*, 1 D., F. & J. 425; In (*x*) Per Lord Westbury, L. R., 1 H. L. 189. re *Corrie’s Will*, 32 Beav. 426; and other cases to the same effect cited in *Martin v. Holgate*, L. R., 1 H. L. 175. *Eyre v. Marsden*, 2 Kee. 564, may perhaps be supported by the reference (“in the same manner,” &c.,) to the gift to the parents: (*y*) In re *Wildman’s Trusts*, 1 J. & H. 302, approved by *Turner, L. J.*, In re *Pell’s Trust*, 3 D., F. & J. 293.

Children not required to survive the period of distribution, though their parents are.

the authority of the decisions above referred to, and it is now settled that children are not by implication required to] survive the period of distribution as expressed with regard to their parents in whose place they stand, [whether the gift to the issue be original—as where it is to such of a class of legatees as survive the period of distribution, and the issue of such as are then dead (a)—or strictly substitutional, *i. e.* divesting a previous *vested gift to the parent. (b) And though the child dies before its

In what cases the children must survive their own parents.

parent, it will still be entitled, if the gift to it be original; (c) but not, it seems, if the gift be substitutional. (d) And where the gift to issue is original, it has been held that if it be to the issue of such of the prior legatees as die *leaving* issue, issue who predecease their parent will not be entitled. (e) ²² But

(a) *Martin v. Holgate*, L. R., 1 H. L. 175. See also *In re Orton's Trusts*, L. R., 3 Eq. 375. The previous decisions were *Stanley v. Wise*, 1 Cox 432; *Lyon v. Coward*, 15 Sim. 287; *Barker v. Barker*, 5 De G. & S. 753; *Bellamy v. Hill*, 2 Sm. & Gif. 328; *In re Bennett's Trusts*, 3 K. & J. 280; *Crause v. Cooper*, 1 J. & H. 207; *In re Wildman's Trusts*, Id. 299; *Harcourt v. Harcourt*, 26 L. J., Ch. 536 (deed); *Lanphier v. Buck*, 34 L. J., Ch. 650, also reported 2 Dr. & Sm. 484, where the marginal note misstates the gift.

(b) *In re Turner*, 2 Dr. & Sm. 501; *Hodgson v. Smithson*, 21 Beav. 354. See also *Masters v. Scales*, 13 Beav. 60; *Buckle v. Fawcett*, 4 Hare 536, 545; *In re Pell's Trust*, 3 D., F. & J. 291, in which three cases the gift was to the parents, or such of them as survived and the issue of such as were dead; which is a vested gift, subject to be divested in favor of issue if any, and if none, in favor of survivors. And see *In re Merrick's Trusts*, L. R., 1 Eq. 551, which was treated by Wood, V. C., as a substitutional gift to issue; but see the definition given by Kindersley, V. C., 2 Dr. & Sm. 494, and by Lord Westbury, L. R., 1 H. L. 181.

Pearson v. Stephen, 5 Bli. (N. S.) 203,

2 D. & Cl. 328, has been cited *contra*; but though the decree as drawn up appears to support the doctrine that in a case of substitution the issue are impliedly subject to the same conditions as their parent, the only point *argued* in the case was whether, under a gift of personalty to several and their issue *per stirpes*, "issue" was a word of limitation or purchase, *i. e.*, whether the parents took absolutely, or for life only with remainder to their children. See per Kindersley, V. C., 34 L. J., Ch. 659.

(c) *Lanphier v. Buck*, 2 Dr. & Sm. 484; *In re Smith's Trusts*, 7 Ch. D. 665; notwithstanding *Humfrey v. Humfrey*, 2 Dr. & Sm. 49.

(d) *In re Turner*, 2 Dr. & Sm. 501; *Hurry v. Hurry*, L. R., 10 Eq. 346. And see *In re Bennett's Trusts*, 3 K. & J. 280; *Crause v. Cooper*, 1 J. & H. 207; *In re Merrick's Trusts*, L. R., 1 Eq. 551; all decided by Wood, V. C., as cases of substitutional trusts.

(e) *Thompson v. Clive*, 23 Beav. 282; per Kindersley, V. C., *Lanphier v. Buck*, 2 Dr. & Sm. 499.]

²² See *Wms. Ex'rs* (6th Am. ed.) 1308, n.

the better opinion appears to be that if *any* issue survive the parent, the interest of all, whether they survive or not, will be preserved.] (f)

IV.—It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included.²³ Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.

Rule where number of children is erroneously referred to.

Thus in *Tomkins v. Tomkins*, (g) where a testator, after *bequeathing £20 to his sister, gave to her *three* children £50 each; and the legatee had *four*; Lord Hardwicke held that they were *all* entitled.

Gift to A's three children, there being four, held to comprehend all.

So, in *Scott v. Fenoulhett*, (h) a bequest to C of £500 “and the like sum to each of his daughters, if *both* or *either* of them should survive Lady C.,” was held to belong to *three* daughters who were living when the will was made. It was contended, in this case, that the bequest

[(f) In *re Smith's Trusts*, 7 Ch. D. 665; and see cases ch. XLIX., *ad fin.*]

23. See Theobald on Wills 141. And in a gift to the four children of testator's daughter A, it was held that, one having died without testator's knowledge, the remaining three took the whole gift, as a class, *Lawton v. Hunt*, 4 Strobh. 1; so, too, *Carthew v. Enraght*, 20 W. R. 743. In *Matthews v. Foulshaw*, 12 W. R. 1141, a gift to my nine grandchildren, “the 3 children of A, the 3 children of B, the 2 children of C and the child of D,” included ten grandchildren, A having four children, two by first wife and two by second—and evidence was not admitted to show that only the two children of A by the first marriage were intended. See also note 24. And see *Thompson v. Young*, 25 Md. 450; *Shepard v. Wight*, 5 Jones Eq. 22. In *re Smith's Trusts*, 9 L.

R., Ch. Div. 117, a gift to “the five children of A,” A having two children born subsequently, and testator knowing that fact, did not include those subsequently born. On the other hand, in *Ward v. Tompkins*, 3 Stew. (N. J.) 3, a gift to be divided “between” the children of A, was not restricted, by the word “between,” to two children then born, to the exclusion of a third born afterward.

(g) Cit. 2 Ves. 564, cit. 3 Atk. 257, and stated from the Register's Book, 19 Ves. 126; [*Morrison v. Martin*, 5 Hare 507; *Spencer v. Ward*, L. R., 9 Eq. 507; In *re Basset's Estate*, L. R., 14 Eq. 54.] See the same principle applied to bequests to servants, in *Sleech v. Thorington*, 2 Ves. 561.

(h) 1 Cox 79, cit. 2 B. C. C. 86, where it is erroneously stated to be a bequest to two daughters.

was intended for two daughters who resided very near the testator, the third living at a great distance from him; but as the point had not previously been raised in the cause, and it appeared that the testator knew the last-mentioned daughter, Lord Thurlow refused an inquiry.

Again, in *Stebbing v. Walkey*, (i) where a testator bequeathed certain stock unto "the *two* daughters of T. in equal shares," during their lives; and if *either* of them should die, then to pay the whole to the survivor during her life, and in case *both* should depart this life, then the whole to fall into the residue. At the date of the will T. had *three* daughters, all of whom were held to be entitled; Sir Ll. Kenyon, M. R., declaring that he yielded to the authority of the cases, and not to the reason of them.

So, in *Garvey v. Hibbert*, (k) Sir W. Grant, on the authority of the last case, held *four* children to be entitled under a bequest "to the *three* children of D" of £600 each. In this case a question arose whether, in the adoption of this construction, the aggregate amount of the three legacies was to be divided among the four, or each of the four was to take a legacy of the same amount as was given to each of the three: the counsel for the legatees contended only for the former; but the M. R., on the authority of *Tomkins v. Tomkins*, (l) adopted the latter construction.

[And in *M'Kechie v. Vaughan*, (m) where £500 was bequeathed "to each of my four nieces the daughters of my late brother A," and at the date of the will there were five, Sir W. James, V. C., held that each of the five was entitled to a legacy of £500. It was argued that the blank showed an intention to select particular nieces, and that this not being effectually done, the gift was void for uncertainty; but *the V. C. thought that the blank was much more probably due to the testator being ignorant of the state of the family, and was not enough to take the case out of the general rule.]

Again, in *Berkeley v. Pulling*, (n) where a testator directed his property to be "divided into *eight* equal shares, and disposed as follows among the children of A and B," and then proceeded to give to some two shares, and to others

Bequest to the two daughters of T., there being three.

Pecuniary legacy given to three, held that the fourth took one of equal amount.

Gift to four with a blank as if for names, there being five.

Division into eight, there being seven objects only.

(i) 2 B. C. C. 85, 1 Cox 250; [Lee v. Pain, 4 Hare 249; Lee v. Lee, 10 Jur. (N. S.) 1041.]

(k) 19 Ves. 125.

(l) *Supra* *189.

[(m) L. R., 15 Eq. 289.]

(n) 1 Russ. 496.

one, but enumerating seven shares only; Lord Gifford, M. R., considering that this was evidently a mistake, held that the property should be divided into seven shares.

In cases the converse of the preceding, *i. e.* where the number of children mentioned in the will exceeds the actual number, of course there is no hesitation in holding all the children to be entitled; and, in Lord Selsey *v.* Lord Lake, (o) a trust for the five daughters of the testator's niece, E, and the survivors and survivor of them, was held to apply to a daughter of E (and who was the only daughter at the date of the will,) and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word "daughters" was written by mistake for *sons*.

"To the five daughters of E," there being one daughter and five sons.

[But, in Lane *v.* Green, (p) under a bequest of £100 each to the four sons of A, A having in fact, three sons and a daughter; Sir J. K. Bruce, V. C., thinking it clear that the testator intended to give four legacies of £100, held the daughter entitled to a legacy as well as the sons.]

To the four sons of A, there being three sons and one daughter.

The case of Harrison *v.* Harrison (q) presents an example both of overstatement and of understatement of the true number; the bequest being to "the two sons and the daughter of T. L., £50 each." There were one son and five daughters living at the date of the will, all of whom were held to be entitled.

[The ground on which the court has proceeded is that it is a mere slip in expression; (r) and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule. Thus, where a testatrix bequeathed to the three children of her niece, A, £500 each, knowing that A had nine children, all the children were held entitled to a legacy. (s) Evidence was offered that when A had only three *children, the testatrix being aware of that fact had made a will in the terms stated above, and had, in the intervals after the births (of which she was regularly informed) of a fourth and ninth child, made a second and third will, and finally the will which was in question: and all these wills were in the same words. But Sir J. K. Bruce, V. C.,

Testator's knowledge of the real number does not affect the rule.

(o) 1 Beav. 151.

(r) Per Grant, M. R., 19 Ves. 126.

[(p) 4 De G. & S. 239.]

(s) Daniell *v.* Daniell, 3 De G. & S.

(q) 1 R. & My. 72. [And see Hare *v.* 337; Scott *v.* Fenoulhett, 1 Cox 79. Cartridge, 13 Sim. 165.

thought that assuming the admissibility of the evidence (which he purposely avoided deciding), it was not sufficient to exclude the claim of the six younger children.

And in *Yeats v. Yeats*, (t) where a testator bequeathed £40 a year "to each of the seven children now living of A :—" it was proved that a year before the date of the will the testator had been informed, as the fact was, that A then had seven children. But in the interval two more were born ; and it was held, that the general rule must prevail, and that all nine were entitled to annuities.

But, as was implied in the very statement of the rule, it is not applicable where the context, with such aid if any from extrinsic facts as may be necessary and admissible, points out which of the children the testator intended to describe by the smaller number. There is then no uncertainty, and the presumption of mistake and the consequent rejection of the numerical restriction are inadmissible. Thus a gift equally among "my four nephews and niece, namely, A, B, C and D," there being four nephews besides D the niece, was held to include only those named. (u) So where the testator gave a legacy to the two grandchildren of A, adding, "they live at X," and A had three grandchildren, but only two lived at X, it was held that only these two were entitled. (x)

Again, in *Hampshire v. Peirce*, (y) where a testatrix gave £100 "to the four children of my late cousin E. B. equally to be divided ; if any of them should die under twenty-one or unmarried, their share or shares shall go to the survivors of them ;" at the date of the will there were living two children of E. B. by P. a former husband, both then of age, and four children by B., all infants, and it was urged that "four" ought to be rejected. But Sir J. Strange, M. R., said, "I should have had some doubt if it had not so entirely corresponded with the circumstances and situation of the family at that time. Here were not six children by one and the same husband, as it was in *Tomkins v. Tomkins*, but two broods of children by different husbands ; therefore it was natural, in pointing out the number, to understand her pointing out that particular brood of number four ; and so there is not that uncertainty as if all the children had been by the same husband." He also adverted to the

(t) 16 Beav. 170.

in *In re Hull's Estate*, 21 Beav. 314.

(u) *Glanville v. Glanville*, 33 Beav. 302. So a gift "to all the children of A, namely," &c., was confined to those named

(x) *Wrightson v. Calvert*, 1 J. & H. 250.

(y) 2 Ves. 216.

clause of survivor if any should die under twenty-one, which the P. children could not, being both of age. It must be observed that the M. R. thought there was still some uncertainty left, and that to remove it he admitted evidence of *declarations* by the testatrix that she intended the four B children only. "It may be well doubted," said Lord Abinger, in *Doe v. Hiscocks*, (z) "whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence."

So, in *Newman v. Piercey*, (a) where a testatrix bequeathed "to Mrs. Walden, widow of the late William Walden, £100, and to each of her three children a like sum of £100;" at the date of the will there was no person answering the description "Mrs. W.," &c., consequently parol evidence of the circumstances was admissible to explain that. This evidence showed that William Walden, a half brother of the testatrix, had died leaving a widow and three children; and that she had since married P. and (as the testatrix knew) had *some* children by him. It was held by Sir G. Jessel that the P. children did not answer the description in the will, for at no period of their lives could they be described as the children of "Mrs. W., widow of the late W. W.:" they were the children of Mrs. P. and not of the widow of W. Taking the description and the evidence together, he thought it clear that the children of Mrs. W., by W. W., were alone intended to take. One of those three was dead at the date of the will, but it appeared probable, and was assumed, that she did not know it: as far as she knew, there were still three.]

Of course, if the number mentioned by the testator agree with the number existing at the date of the will, there is no *ground for extending the gift to an after-born child, (b) [although *en ventre sa mere* at the date of the will.] (c)

On the same principle as that which governed the preceding cases, it has been decided, that where (d) a testator bequeathed the residue of his personal estate to be divided equally among his *seven* children, A, B, C, D, E and F (naming

Gift to testator's seven children, naming only six, there being in fact eight.

(z) 5 M. & W. 371, *ante* p. *436.

[(c) In re Emery's Estate, 3 Ch. D.

(a) 4 Ch. D. 41. It is singular that *Hampshire v. Peirce*, was not cited in this case.]

300.]

(d) *Humphreys v. Humphreys*, 2 Cox 184. See also *Garth v. Meyrick*, 1 B. C.

(b) *Sherer v. Bishop*, 4 B. C. C. 55.

C. 30; [*Eddels v. Johnson*, 1 Giff. 22.]

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only *six*), and it turned out that he had eight children when he made his will, but from other parts of his will it appeared that he considered one of his children as fully provided for; the *seven* other children were entitled. 24

V.—Where a gift is to the children of several persons, whether it be to the children of A and B, (e) or to the children of A and the children of B, (f) they take *per capita*, not *per stirpes*.

Whether children take *per stirpes* or *per capita*.

The same rule applies, where a devise or bequest is [made to a person and the children of another person; (g) or] to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to “my son A and the children of my son B;” (h) in which case A takes only a share equal to that of one of the children of B,

24. In *Zimmermann v. Briner*, 50 Penna. St. 535, where a gift was to “my nine children” (naming them) and A (the wife of a tenth child), the tenth child was not included; so in *Ellis v. Ellis*, 2 Desaus. 556, where the gift was to six children by name, a seventh, an after-born child, was not included. See also *Kalbfleisch v. Kalbfleisch*, 67 N. Y. 354, where the testator devised property to three of his nine children, charging it with a payment “to the other 8 of my children,” and directing that the sum “shall make a part of the amount specifically devised to my children, and shall not be considered as additional or in excess thereof.” This payment was confined to five (among the remaining six) to whom specific sums of money had been bequeathed.

(e) *Weld v. Bradbury*, 2 Vern. 705; *Lugar v. Harman*, 1 Cox 250; [*Pattison v. Pattison*, 19 Beav. 638; *Armitage v. Williams*, 27 Id. 346.]

(f) *Lady Lincoln v. Pelham*, 10 Ves. 166; see also *Barnes v. Patch*, 8 Ves. 604; *Walker v. Moore*, 1 Beav. 607; [*Bolger v. Mackell*, 5 Ves. 509; *Eccard v. Brooke*, 2 Cox 213; *Heron v. Stokes*, 2 D. & War. 89.

(g) *Butler v. Stratton*, 3 B. C. C. 367; *Dowding v. Smith*, 3 Beav. 541; *Rickabe v. Garwood*, 8 Id. 579; *Paine v. Wagner*, 12 Sim. 184; *Amson v. Harris*, 19 Beav. 210.]

(h) *Blackler v. Webb*, 2 P. W. 383; *Williams v. Yates*, 1 C. P. Coop. 177, 1 Jur. 510; [*Hyde v. Cullen*, Id. 100; *Linden v. Blackmore*, 10 Sim. 626; *Tomlin v. Hatfield*, 12 Sim. 167; *Tyndale v. Wilkinson*, 23 Beav. 74; *Payne v. Webb*, L. R., 19 Eq. 26. In *Blackler v. Webb*, Lord King, C., said that A and the children of B “should each of them take *per capita*, as if all the children had been named by their respective names.” This is not to be understood as limiting the class of children capable of taking to those living at the date of the will; on the contrary, the general rule applies by which all children born before the period of distribution are admitted to share, *Dowding v. Smith*, 3 Beav. 541; *Linden v. Blackmore*, 10 Sim. 626; *Cooke v. Bowen*, 4 Y. & C. 244. But see *Parkinson's Trust*, 1 Sim. (N. S.) 242; where, however, the point seems not to have been noticed. *Scott v. Scott*, 15 Sim. 47, went apparently upon the rule in *Wild's Case*.

though it may be conjectured that the testator had a distribution according to the statute in his view. [So if the gift be to A and B and their children, or to a class and their children, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund; that is, the distribution will be made *per capita*.] (i)

*But this mode of construction will yield to a very faint glimpse of a different intention in the context. Thus the mere fact, that the annual income, until the distribution of the capital, is applicable *per stirpes*, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital. (k) [And the same effect was held by Sir J. K. Bruce, V. C., to be produced by the share of one *stirps* being, in the case of its failure before the period of distribution, given over to the others, *per stirpes*. (l) And a residue given to the children of a testator's son and daughters, A, B, C and D, was held by Sir L. Shadwell, V. C., to be divisible *per stirpes*, by reason of a gift over of the shares of any of the son and daughters (who had previous life-interests) dying without leaving issue, to the survivors and their issue. (m) By this clause the testator showed he did not intend a distribution *per capita*, since, in that case, the whole residue would, by force of the original gift, have gone among the children of those who had children in equal shares. (n)

Children will also generally take *per stirpes* where the gift to them is substitutional, as in the case of a bequest to several or their children. (o) So, where a testator bequeathed the residue of his per-

(i) *Cunningham v. Murray*, 1 De G. & S. 366; *Abbey v. Howe*, Id. 470; *Northey v. Strange*, 1 P. W. 340; *Murray v. Murray*, 3 Ir. Ch. Rep. 120; *Law v. Thorp*, 4 Jur. (N. S.) 447, 27 L. J., Ch. 649. So where a gift is implied from a power to appoint to children or issue, *In re White's Trust*, Joh. 656. As to the question whether the parents take an equal share with their children, or a life interest in the whole with remainder amongst the children, see *post* ch. XXXVIII.]

(k) *Brett v. Horton*, 4 Beav. 239; [see *Crone v. Odell*, 1 Ba. & Be. 449, 3 Dow 61; *Overton v. Bannister*, 4 Beav. 205. Otherwise, it seems, where so much only of the income as the trustees may think

sufficient is so applicable, *Nockolds v. Locke*, 3 K. & J. 6.

(l) *Nettleton v. Stephenson*, 18 L. J., Ch. 191. See also *Archer v. Legg*, 31 Beav. 187.

(m) *Hawkins v. Hamerton*, 16 Sim. 410.

(n) *Smith v. Streatfield*, 1 Mer. 358; *Bolger v. Mackell*, 5 Ves. 509; *Armitage v. Ashton*, W. N., 1869, p. 64 (combined effect of will and codicil.)

(o) *Price v. Lockley*, 6 Beav. 180; *Armstrong v. Stockham*, 7 Jur. 230; *Shailer v. Groves*, 6 Hare 162; *Burrell v. Baskerfield*, 11 Beav. 525; *Congreve v. Palmer*, 16 Beav. 435; *Timins v. Stackhouse*, 27 Id. 434. But see *Atkinson v. Bartrum*, 28 Beav. 219.

sonal estate to A for life, and after his decease, unto and equally amongst all the children of A, except his eldest son J., and amongst the issue of any children of A who should be then dead, and also among the issue of the said J., *such issue taking their respective parents' share*, it was held, that the issue of J. took, *per stirpes*, with the other children of A. (p) And where residue was bequeathed "to be equally divided between my sisters J. and M. and the issue of my deceased sisters E. and A. in equal shares if more than one of *such respective issue*;" it *was held by Lord Westbury that the word "respective" showed there was to be a subdivision of what was taken by the issue of E and A—*i. e.* there must be two subdivisions; consequently two subjects of subdivision: hence the primary division was to be *per stirpes*. (q)

This question often arises upon devises or bequests to two or more persons for their lives, with remainder to their children. The conclusion then depends in a great measure upon whether the tenants for life take jointly or as tenants in common. If the latter, then, as the share of any one will, on his decease, go over immediately, without waiting for the other shares, it is probable that the testator intended it to continue separate and distinct from the other shares, and consequently, to devolve on the children *per stirpes*. (r) If otherwise, then it would follow that the different shares would go to different classes of children; for, after the death of the tenant for life who first died, another might have more children, who would be entitled to participate in a share of any tenant for life who died afterwards.

But such an intention, however improbable, must of course prevail if clearly indicated. Thus, in *Stephens v. Hide*, (s) where a portion of the residue was bequeathed in trust for the testator's two daughters

(p) *Minchell v. Lee*, 17 Jur. 727.
(q) *Davis v. Bennet*, 31 L. J., Ch. 337, 8 Jur. (N. S.) 269. See also *Hunt v. Dorsett*, 5 D., M. & G. 570; *Shand v. Kidd*, 19 Beav. 310.

(r) See accordingly *Pery v. White*, Cowp. 777; *Taniere v. Pearkes*, 2 S. & St. 383; *Willes v. Douglas*, 10 Beav. 47; *Flinn v. Jenkins*, 1 Coll. 365; *Arrow v. Mellish*, 1 De G. & S. 355; *Doe d. Patrick v. Royle*, 13 Q. B. 100; In re *Laverick's*

Estate, 18 Jur. 304; *Bradshaw v. Melling*, 19 Beav. 417; *Hunt v. Dorsett*, 5 D., M. & G. 570; *Coles v. Witt*, 2 Jur. (N. S.) 1226; *Turner v. Whittaker*, 23 Beav. 196; *Archer v. Legg*, 31 Beav. 187; *Milnes v. Aked*, 6 W. R. 430; *Wills v. Wills*, L. R., 20 Eq. 342.

(s) Cas. temp. Talb. 27. See also *Swabey v. Goldie*, 1 Ch. D. 380. But see *Waldron v. Boulter*, 22 Beav. 284.

for their lives, as tenants in common, "and afterwards to their or either of their child or children," and for default of such issue, over; one of the daughters died leaving a son, and the other without children; and it was held that the son was entitled to the whole fund, since the testator had used plain words to show his intent, that whether there was one or more children, in either case the child or children should take the whole. So in *Abrey v. Newman*, (t) where a testator bequeathed property "to be equally divided between A and B for the period of their natural lives, after which to be equally divided between their children, *that is to say the children of A and B above named.*" Sir J. Romilly, M. R., held, that on the death of A one half of the fund was divisible *per capita* among the children of both A and B: he thought the last words of *the bequest prevented him from reading the preceding words as their respective children.

Where the property is given to several for life and afterwards to the children of some only of the tenants for life, there is no difficulty in holding the children to be entitled *per capita*. (u)

On the other hand, if the tenants for life take jointly, or (which is for this purpose equivalent) as tenants in common with express or implied survivorship, the whole subject of the devise remains undivided until the death of the survivor, and then goes over in a mass. In this case there is but one period of distribution, and presumably one class of objects; who therefore *prima facie* take *per capita*. (x) And the same argument is applicable although the life interest does not survive, if the general distribution among the children is postponed until after the death of the last surviving tenant for life. (y)

Secondly,
where A and B
are joint
tenants.

The case of *Smith v. Streatfield* (z) may perhaps be referred to a similar principle. A legacy was there given in trust to pay one-half of the income to A and the other half to B, for their lives, "and as their lives drop and expire, I direct that the principal and interest be reserved, and be equally divided among their children when they shall severally attain the age of twenty-one years;" A died childless, and it

(t) 16 Beav. 431. See also *Peacock v. Stockford*, 3 D., M. & G. 73.

(u) *Swan v. Holmes*, 19 Beav. 471. See also *Sarel v. Sarel*, 23 Beav. 87.

(x) *Malcolm v. Martin*, 3 B. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. 246; *Stevenson v. Gullan*, 18 Beav. 590; *Parker*

v. Clarke, 6 D., M. & G. 110; *Parfitt v. Hember*, L. R., 4 Eq. 443; *Taaffe v. Conmee*, 10 H. L. Cas. 64. Compare *Shand v. Kidd*, 19 Beav. 310; *Begley v. Cook*, 3 Drew. 662.

(y) *Nockolds v. Locke*, 3 K. & J. 6.

(z) 1 Mer. 358, *ex rel.*

was held by Sir W. Grant, M. R., after some hesitation, that the children of B (who had all attained twenty-one) were entitled to the whole sum. The reasons of this decision do not appear, but were probably those which were urged in argument, that the direction to *reserve* and divide at twenty-one rendered the limitation over independent of the periods when the previous interests determined.]

Where (a) a testator bequeathed his "fortune" to be equally divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should not leave any second or younger son, the testator gave and bequeathed his said fortune to his said brother and sister; it was held, that there being no son of J., and but one younger son of S., such younger son took the whole.

To the
younger sons
of J. and S.,
J. having
none.

Where (a) a testator bequeathed his "fortune" to be equally divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should not leave any second or younger son, the testator gave and bequeathed his said fortune to his said brother and sister; it was held, that there being no son of J., and but one younger son of S., such younger son took the whole.

Here it may be observed, that where the gift is to A and *B's children, or to "my brother and sister's children," (the possessive case being confined to B and the sister,) it is read as a gift to A and the children of B, or to the brother and the children of the sister, as it strictly and properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify. (b)

So a bequest of a residue to be divided among "the children of my late cousin A, and my cousin B, and their lawful representatives," has been held to apply to B, not to his children. (c) 25

[To make the bequest clearly applicable to the children of B the word "of" ought to have been repeated before the words "my cousin B." (d) But the sentence was not strictly accurate, even as a gift to B, and not to his children. It ought, for that purpose to have run, "to the children of my late cousin A and to my cousin B." An in-

(a) *Wicker v. Mitford*, 3 B. P. C. Toml. 442. And see *Malcolm v. Martin*, 3 B. C. C. 50.

(b) See *Doe d. Hayter v. Joinville*, 3 East 172. If, however, A and B were husband and wife (as if the bequest were to John and Mary Thomas' children) no doubt the construction would be different; it would apply to the children of both.

(c) *Lugar v. Harman*, 1 Cox 250. [See also *Stummvoll v. Hales*, 34 Beav. 124; *In re Ingle's Trusts*, L. R., 11 Eq. 578,

590 (where the construction was aided by a reference to "the legacy left to B.") And see *Trail v. Kibblewhite*, 12 Sim. 5, where a gift to "the aunts of A and his sister B" was held not to entitle B to a legacy. But see *In re Davies' Will*, 29 Beav. 93.]

25. See also *Burnet v. Burnet*, 3 Stew. (N. J.) 595; *Pitney v. Brown*, 44 Ill. 363.

(d) *Peacock v. Stockford*, 3 D., M. & G. 73 ("for the benefit of the children of A and of B.")

tention that the sentence should be read as a gift to the children of B, has therefore been inferred from slight circumstances, as, from a bequest, in another part of the will, of equal legacies to the parents A and B (e) —a circumstance which was taken to show that they were to be on an equality, and which distinguished the case from *Lugar v. Harman*, (c) where A was dead at the date of the will, and was so described.]²⁶

(e) *Mason v. Baker*, 2 K. & J. 567.]

(c) See note (c), preceding page.

26. See *Wms. Ex'rs* (6th Am. ed.) 1623, q; *Hawkinson Wills* 113; 2 *Redf. on Wills* 34; *Theobald on Wills* 149-152; *O'Hara on Int. of Wills* 324. In the following cases the general rule that children take *per capita* has been observed: *Weston v. Foster*, 7 *Metc.* 97, "to be equally divided between the children of A, B and C; *Emerson v. Cutler*, 14 *Pick.* 108, "to be equally divided between them;" *Kuhn v. Webster*, 12 *Gray* 3, to A for life, remainder to three nieces and to their children living at the decease of A, to be equally divided among them share and share alike; *Farmer v. Kimball*, 46 *N. H.* 435, to cousins and children of mother's cousins "to be divided equally between them;" *Jackson v. Luquere*, 5 *Cow.* 221, to children of A and B, "to be divided between them share and share alike;" *Murphy v. Harvey*, 4 *Edw. Ch.* 131, to A, B and C and their children, "to be equally divided among them who shall survive and the children and heirs of the deceased;" *Collins v. Hoxie*, 9 *Paige Ch.* 81, "to be divided equally among the children of A and B;" *Lee v. Lee*, 16 *Abb. Pr.* 125, to A and the children of B; *Stevenson v. Lesley*, 70 *N. Y.* 512; *Smith v. Curtis*, 5 *Dutch.* 345, "to be equally divided between" testator's brothers and sisters, and the brothers and sisters of his wife; *Stokes v. Tilly*, 1 *Stockt.* 130, "to be equally divided between the children of my nephew A and my sister B, each one to have an equal share thereof and his children—the children of my deceased nephew C to take their equal share therein with my sister B and the children of A;" to like effect,

Thornton v. Roberts, 3 *Stew. (N. J.)* 473; *Macknet v. Macknet*, 9 *C. E. Gr. (N. J.)* 293, children of A and of testator; *Burnet's Ex'r v. Burnet*, 3 *Stew. (N. J.)* 595, "children of A" and B. So, too, *Pitney v. Brown*, 44 *Ill.* 363. In *Bender's Appeal*, 3 *Grant's Cas.* 210, *Lewis, C. J.*, says: "The words 'equally to be divided' when used in a will mean a devise *per capita* and not *per stirpes*, whether the devisees be children and grandchildren, brothers and sisters and nephews and nieces, or strangers in blood to the testator. But where the will is silent in respect to the manner in which the legatees are to take, if the next of kin of the person described be not related to the testator in equal degree, those most remote can only claim *per stirpes*." *Peale's Estate*, 32 *Leg. Int. (Pa.)* 374, to A and the children of B, "share and share alike;" *Kean v. Roe*, 2 *Harring.* 103, "to be equally divided between;" *Benson v. Wright*, 4 *Md. Ch.* 279, to A and children of B; *Brown v. Ramsey*, 7 *Gill* 347, "to be equally divided between children of A and children of B;" *Brewer v. Opie*, 1 *Call* 184, "to be equally divided;" so, too, *Crow v. Crow*, 1 *Leigh* 74; *McMaster v. McMaster*, 10 *Gratt.* 275; *Martin v. Gould*, 2 *Dev. Eq.* 305; *Hill v. Spruil*, 4 *Ired. Eq.* 244; *Patterson v. Patterson*, 3 *Jones Eq.* 208; *Feinster v. Tucker*, 5 *Jones Eq.* 74; *Cheever v. Bell*, 1 *Jones Eq.* 237, to C's four children by name, and A; *Lane v. Lane*, 1 *Winst. Eq.* 84, to children and grandchildren; *Kirkpatrick v. Rogers*, 6 *Ired. Eq.* 135, to brother's and sister's children; *Britton v. Miller*, 63 *N. C.* 270, same as last; *Waller v. Forsythe*, *Phill. Eq.* 353, "to be equally divided;" *Ex parte Leith*,

Whether dying without children means *having or leaving* a child.

VI.—Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without children, (*f*) means without *having had* or without *leaving*

1 Hill Eq. 153; Withers v. Yeadon, 1 Rich. Eq. 324; Perdrian v. Wells, 5 Rich. Eq. 20, "share and share alike;" Barksdale v. Macbeth, 7 Rich. Eq. 132, "to be equally divided;" Wessenger v. Hunt, 9 Rich. Eq. 459, children and grandchildren; Dupont v. Hutchinson, 10 Rich. Eq. 1; Conley v. Kincaid, 1 Winst. Eq. 44; Smith v. Ashurst, 34 Ala. 208; Howard v. Howard, 30 Ala. 391, to A and B (brother and sister of half-blood) and children of C and D (deceased sisters of whole-blood) "share and share alike—and should either of my said whole sisters' children be dead leaving children, they shall take the place of their deceased parent;" Nichols v. Denny, 8 Geo. (Miss.) 59; Wells v. Newton, 4 Bush 159; Brown v. Brown, 6 Bush 648; Walters v. Crutcher, 15 B. Mon. 2; see also Matthews v. Foulshaw, 12 W. R. 1141; Atkinson v. Bartrum, 28 Beav. 219; Davies' Will, 29 Beav. 93; Stummvoll v. Hales, 34 Beav. 124 (1864); Fox's Will, 35 Beav. 163 (1865); Swabey v. Goldie, 1 L. R., Ch. Div. 380 (1873); Payne v. Webb, 31 L. T. R. (N. S.) 637 (1874); In re Sibley, 5 L. R., Ch. Div. 494 (1877.)

The following extract, from Theobald on Wills (Chapter XIV.), illustrates the distinction in the cases:

"A gift to A and the children of B goes *prima facie* to all *per capita* and not *per stirpes*. Dowding v. Smith, 3 Beav. 541; Rickabee v. Garwood, 8 Beav. 579. So, too, a gift to the children of A and B, or even to class A, and class B and C goes *per capita* to all. Dugdale v. Dugdale, 11 Beav. 402; Dowding v. Smith, 3 Beav. 541; Pattison v. Pattison, 19 Beav. 638. Armitage v. Williams, 27 Beav. 346;

Rook v. A. G., 31 Beav. 313; Amson v. Harris, 19 Beav. 210; Tyndale v. Wilkin son, 23 Beav. 74; Baker v. Baker, 6 Ha 269. But a gift over of the share of any child dying before attaining a vested interest in possession not to the other members of the class but to the brothers and sisters of the child so dying, will import a stirpital distribution. Archer v. Legg, 31 Beav. 187. Similarly a gift to several and their issue, or to the children and grandchildren of A, goes to all the children and grandchildren coming into being before the period of distribution *per capita*. Barnaby v. Tassell, 11 Eq. 363; Lea v. Thorp, 6 W. R. 480; 4 Jur. (N. S.) 447, 27 L. J., Ch. 649. In the same way gift after a life interest to surviving children and their issue goes to all the children and issue who survive the period of distribution *per capita*. Re Fox's Will, 35 Beav. 163, 13 W. R. 1013. Shailer v. Groves, which, as reported in 6 Hare 162, might be cited in favor of a different construction, is there wrongly reported. See 11 Jur. 485, 16 L. J., Ch. 367.

"A direction that parents and children are to be classed together, and share in equal proportions, will not import a stirpital distribution. Turner v. Hudson, 10 Beav. 222. But the word 'respective' has a strong stirpital force. Davis v. Bennett, 4 D., F. & J. 327; Ayscough v. Savage, 13 W. R. 373. As to the word 'devolve' see Stonor v. Curwen, 5 Sim. 264. And if the issue of a stirpes are treated as taking among them only one equal share, the stirpital construction will be adopted. Brett v. Horton, 4 Beav. 239; Hunt v. Dorsett, 2 D., M. & G. 570. A gift to

(*f*) Of course this question *may* arise where the person whose issue is referred to is not the prior legatee, but it happens

rarely to have presented itself in such a shape.

In *Hughes v. Sayer*, (g) a testator bequeathed personalty to A and B, and upon either of them dying without children, then to the survivor; and if both should die without children, then over; and it was held to mean children living at the

Upon A and B
both dying
without
children.

several and their issue *per stirpes* or a direction that issue are to take only their parents' share, is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson v. Stephen*, 2 Dow & Cl. 328, 5 Bl. (N.S.) 203; *Johnson v. Cope*, 17 Beav. 561.

"Where the direction is that the issue are to take a parent's share, and the word 'parent' is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be stirpital throughout. *Ross v. Ross*, 20 Beav. 645; *In re Orton's Trust*, 3 Eq. 375; *Palmer v. Crutwell*, 8 Jur. (N.S.) 479. So too where the direction is that the children or grandchildren are to take an original share between them. *Powell v. Powell*, 28 L. T. (N.S.) 730. But a mere direction that the share of any of the original takers dying is to go to his issue, would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall v. York*, 5 Jur. (N.S.) 1237; *Southam v. Blake*, 2 W. R. 446; *Weldon v. Hoyland*, 4 D., F. & J. 564. *Robinson v. Sykes*, 23 Beav. 40, which is *contra*, was on a marriage settlement. If the devise is to several and their issue *per stirpes* the stirpital distribution will be carried through throughout, so that no children or remoter issue can take in competition with the parents. *Dick v. Lacy*, 8 Beav. 214; *Gibson v. Fisher*, 5 Eq. 51.

"When the gift is to several for life and then to their children, the cases are not easily reconcilable:

"1. It seems clear that a gift to A and B, as tenants in common for their lives, and then at their death or at their deaths,

or at the death of A and B, to their children, goes, upon the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Taniere v. Pearkes*, 2 S. & St. 383; (see also *Nott's Trusts*, 20 W. R. 569; *Archer v. Legg*, 31 Beav. 187); *Willes v. Douglass*, 10 Beav. 47; *Arrow v. Mellish*, 1 De G. & S. 355; *Turner v. Whittaker*, 23 Beav. 196; *Saril v. Saril*, 23 Beav. 87; see too *Doe d. Patrick v. Royle*, 13 Q. B. 100; *Brown v. Jarvis*, 2 D., F. & J. 168. If the gift is after the deaths of the tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita, inter se*. *Barnaby v. Tassell*, 11 Eq. 363. But if the testator goes on to explain what he means by 'their children' by adding 'that is to say, the children of A and B,' they take *per capita*. *Abrey v. Newman*, 16 Beav. 431.

"2. But if the gift be to A and B for their lives, and at their death not to their children but to the children of A and B, there seems less reason for contending that the children are to take *per stirpes*. However, in *Wells v. Wells*, 20 Eq. 342, the stirpital construction was adopted. See *Milnes v. Aked*, 6 W. R. 430; *Re Nott's Trusts*, 20 W. R. 569. In such a case a superadded direction that, 'if there is but one child, the whole is to go to such only child' would afford an argument that the distribution was meant to be *per capita*. *Pearce v. Edmeades*, 3 Y. & C. Ex. 246, 2 W. R. 672; *Swabey v. Goldie*, 1 Ch. D. 380; see, too, *Peacock v. Stockford*, 7 D., M. & G. 129.

"3. If the gift to the children is not till after the death of the survivor of the tenants for life, it would seem the distri-

death. The great question in this case was, whether the word "children" was not used as synonymous with *issue* (*h*) indefinitely,

bution will be *per capita*; at any rate if the gift is to the children of A and B, and not merely to 'their children.' *Malcolm v. Martin*, 3 Bro. C. C. 50; *Pearce v. Edmeades*, 3 Y. & C. Ex. 246; *Stevenson v. Gullan*, 18 Beav. 590; *Nockolds v. Locke*, 3 K. & J. 6; *Swabey v. Goldie*, 1 Ch. D. 380; see *Alt v. Gregory*, 8 D., M. & G. 221. Perhaps *Smith v. Streatfield*, 1 Mer. 358, comes under this head.

"If the gift is substitutional, as to several or their children, the children take *per stirpes*. *Congreve v. Palmer*, 16 Beav. 435; *Timins v. Stackhouse*, 27 Beav. 434; *Gowling v. Thompson*, 19 L. T. (N. S.) 242. A simple gift, however, to several or their issue, though it would import a stirpital distribution among the families, would not prevent all the issue of each family from taking *per capita*, *inter se*. *Gowling v. Thompson*, 19 L. T. (N. S.) 242.

"In ascertaining the stirpes, reference is to be made to the original stirpes, pointed out by the testator, and not to the stirpes existing at his death, so that there will be as many primary shares as there are original stirpes who at the testator's death have descendants living, *Gibson v. Fisher*, 5 Eq. 51; see, however, *Robinson v. Shepherd*, 10 Jur. (N. S.) 53, 4 De G., J. & S. 129."

The following are instances of a division *per stirpes*: *Houghton v. Kendall*, 7 Allen 72, where, after life estate to A, a gift to her "children who may be the surviving heirs of her body," was divided *per stirpes* among the heirs of her body; so in *Lyon v. Acker*, 33 Conn. 222, a devise to A, B and the children of C; so in *Raymond v. Hillhouse*, 45 Conn. 467, a residuary gift "to be equally divided among my sisters R. and S., the grandchildren of my deceased brother W. and

the grandchildren of my deceased sisters D. and M.;" *Fener v. Pyne*, 18 Hun 411; *Clark v. Lynch*, 46 Barb. 69; *Bool v. Mix*, 17 Wend. 119, a devise to two daughters for life, "to be equally divided between them and after their decease to their and each of their children to be divided between them share and share alike;" *Fisher v. Skillman*, 3 C. E. Gr. (N. J.) 229, a legacy "to be equally divided share and share alike between my children and their legal heirs (naming five children) each a share and the children and heirs of A and of B each a share;" *Fissel's Appeal*, 27 Penna. St. 55, "to be equally divided between the children of A deceased, and the children or heirs of the body of B deceased, and C or his heirs or legal representatives;" *Minter's Appeal*, 40 Penna. St. 111, "share and share alike among the children of A. and the children of M. and to my sister B. * * * said B. and the children of my said brothers A. and M. shall have * * * share and share alike;" *Alder v. Beale*, 11 Gill & J. 123, "between the children of my sister A and their heirs forever and the children of my sister B and their heirs forever; *Crow v. Crow*, 1 Leigh 74, "to be divided equally between my children, to wit, the heirs of A (deceased son—naming seven), B, C, D (all sons) and the children of my deceased daughter E and the children of my deceased daughter F * * * the children of each daughter to take their mother's share—a child's part"—here A's children took *per capita* and E's and F's *per stirpes*; *Hamlett v. Hamlett*, 12 Leigh 350, "to be divided equally among A B, the children of C and the children of D; so A and the children of B, *Hoxton v. Griffiths*, 18 Gratt. 574; and to the same effect see *Bivens v. Phifer*, 2 Jones L. 436; *Gil-*

(*h*) As to which, see *Doe d. Smith v. Webber*, 1 B. & Ald. 713, and *ante* *101.

in which case the bequest over would have been void; and the M. R. seems to have thought that, whether it meant *issue* or *children*, it referred to the period of the death. (i)

So, in *Thicknesse v. Liege*, (k) where a testator devised the residue of his estate in trust for his daughter for life, and after her decease among her issue, the division to be when the youngest should attain twenty-one; and if any of them should be then dead, leaving lawful issue, the guardian of such issue to take his or her share. *But if his daughter happened to die without any child*, or the youngest of them should not arrive to twenty-one, and none of them should have left issue, then over. The testator's daughter at the time of his death had one child, who had four children, but they, as well as their mother, all died in the lifetime of the daughter, so that she died without leaving issue at her death; and it was held that the devise over took effect.

If A happened to die without any child.

[And this construction is more easily adopted when, in another part of the will, the testator has used other words signifying death without having ever had any children.] (l)

But the words *without having children* are construed to mean, as they obviously import, without having *had* a child.

Without having children, how construed.

Thus in *Weakley d. Knight v. Rugg*, (m) where leasehold property was bequeathed to A, "and in case she died without *having* children," over; it was held that the legatee's interest became indefeasible on the birth of a child.

In *Wall v. Tomlinson*, (n) a residue which was given to A "in case she should have legitimate children, in failure of which," over, was held to belong absolutely to A on the birth of a child, who died before

liam v. Underwood, 3 Jones Eq. 100; *Lockhart v. Lockhart*, 3 Jones Eq. 205; *Shinn v. Motley*, 3 Jones Eq. 490; *Roper v. Roper*, 5 Jones Eq. 17; *Ward v. Sutton*, 5 Ired. Eq. 421; *Henderson v. Womack*, 6 Ired. Eq. 441; *Cole v. Crayon*, 1 Hill Eq. (S. C.) 322; *Conner v. Johnson*, 2 Hill Eq. (S. C.) 41; *Hamilton v. Lewis*, 13 Mo. 184, children and grandchildren; *Jamison v. Hay*, 46 Mo. 546 (statutory); *Lackland v. Dowling*, 11 B. Mon. 32; see also chapter XXVIII., note 18, and chapter XXIX., note 18. So in *Gring's Appeal*, 31 Penna. St. 292, where the gift was to brothers "or their children;" and *Talcott v. Talcott*, 39 Conn. 186, to children of A and children of B, though severally named. So, too, *Hoppock v. Tucker*, 59 N. Y. 202.

(i) But see *Massey v. Hudson*, 2 Mer. 135.

(k) 3 B. P. C. Toml. 365.

[(l) *Jeffreys v. Conner*, 28 Beav. 328.]

(m) 7 T. R. 322. See also *Stone v. Maule*, 2 Sim. 490; [*Findon v. Findon*, 1 De G. & J. 380; *Jeffreys v. Conner*, *sup.*]

(n) 16 Ves. 413.

the parent. "Failure" here evidently referred not to the child, but to the event of "having children."

[So, in *Bell v. Phyn*, (o) where the bequest was to the testator's three children, A, B and C, but in case of the death of any of them without being married (p) and having children, then over, Sir W. Grant, M. R., held that the share of A was absolutely vested in her upon the birth of a child.]

The word *leaving* obviously points at the period of death. (q) *Thus a gift to such children or issue as a person may leave is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; 27 and this construction was applied in a case (r) where there was a gift to the lawful issue of A and B, and of such of them as should *leave* issue, the latter words being considered as explaining, that the word "issue," in the first part of the sentence, meant those who were left by the parent; the consequence of which was, that the children who did not survive the parent were not entitled to participate with those who did.

Although, as we have seen, the word "leaving" *prima facie* points to the period of death, yet this term, like all others, may receive a different interpretation by force of an explanatory context. Where a gift over is to take effect in case of a prior legatee for life, whose children are made objects of gift, dying without *leaving* children, it is sometimes construed as meaning, in default of objects of the prior gift, even though such gift should not have been confined to children living at the death of the parent. (s) 28 [And in the case of a devise of real estate, a limitation over if the devisee should die without *leaving* children, may sometimes give him an estate tail.] (t)

—or indefinitely, so as to create an entail.

(o) 7 Ves. 453.
(p) "Without being married" was construed to mean "without having ever been married;" and the word "and" as "or," *ante* p. *519.

(q) *Read v. Snell*, 2 Atk. 647.]
27. See also *Theobald* on Wills 381; *Hawkins* on Wills 217; *O'Hara* on Int. of Wills 291; *Bythessea v. Bythessea*, 23

L. J., Ch. 1004; *Watson's Trusts*, 10 L. R., Eq. 36; *Jeyes v. Savage*, 10 L. R., Ch. App. 555; *Young v. Turner*, 1 B. & S. 550; *Sheffield v. Kennett*, 27 Beav. 207, 4 De G. & J. 593.

(r) *Cross v. Cross*, 7 Sim. 201.
[(s) *Maitland v. Chalie*, 6 Mad. 243, and other cases, ch. XLIX., *ad fin.*]
28. Mr. Theobald, in his treatise on

[(t) See *Raggett v. Beatty*, 5 Bing. 243, and other cases stated *post* ch. XXXVIII. The same may be said of the words "dy-

ing without children," *Bacon v. Cosby*, 4 De G. & S. 261, stated *post*, same chap.]

Where the gift over is in the event of *two* persons, husband and wife, not leaving children, the question arises, whether the words are to be construed in case both shall die without leaving a child living at the death of *either*, or in case both shall die without leaving a child who shall survive *both*.

In case of two persons, husband and wife, leaving no children.

As in *Doe d. Nesmyth v. Knowls*, (*u*) where the devise was to William Smyth and Mary his wife, and the survivor of them, during their lives, then to Mary their daughter, or, if more children by Mary, equal between them; and, *in case they leave no children*, to their heirs and assigns forever; it was held that the fee simple became vested under the last devise, when the survivor of William and Mary (namely William,) died leaving no children of their marriage surviving him, though a child was living at the death of Mary; Bayley, J., observing—"they cannot be said to leave no children till both are gone."

If the several persons, on whose decease without children the gift over is to take effect, be not husband and wife, the obvious *construction is to read the words as signifying, "in case each or every such person shall die without leaving a child living at his or her own decease," supposing, of course, that the testator is not contemplating a marriage between these persons, and their having children, the offspring of such marriage; a question which can only arise when the persons are of different sexes and not related within the prohibited degrees of consanguinity; for the law will not presume that a marriage between such persons, *i. e.* an illegal marriage, was in the testator's contemplation.

Distinction where they are not husband and wife.

Wills, pp. 381, 382, lays down the following rules:

1. When there is a bequest or devise to A for life, and after his death to his children, whether a particular time is fixed at which their shares are to vest or not, followed by a gift over upon the death of A without leaving children, the children of A, either at their birth or at the particular time appointed, as the case may be, take indefeasible interests not liable to be defeated by death during the life of A.

2. The court, however, will not depart from the ordinary meaning of the word *leaving* in order to vest interests which were not vested before, *e. g.*, gift, *if the tenant for life leaves children, to such chil-*

dren, if not, over.

3. It seems the words "without having" any child may be construed as equivalent to "without having had" any child.

4. But the words "without any children" mean without children at the death.

In the following cases "without leaving" has been construed to mean "without having had:" *White v. Hill*, 4 L. R., Eq. 265; *Bryden v. Willett*, 7 L. R., Eq. 472; *Trehame v. Layton*, 10 L. R., Q. B. 459; while in *Brown's Trusts*, 16 L. R., Eq. 239, "leaving" was construed to be equivalent to "having;" so likewise *Eastwood v. Lockwood*, 3 L. R., Eq. 487.

(*u*) 1 B. & Ad. 324.

VII.—We are now to consider the construction of *gifts to younger children*, the peculiarity of which consists in this, that as the term *younger children* generally comprehends the branches not provided for of a family (younger sons being excluded by the law of primogeniture from taking by descent,) the supposition that these are the objects of the testator's contemplation so far prevails, and controls the literal import of the language of the gift, that it has been held to apply to children who do *not* take the family estate, *whether younger or not*, (x) to the exclusion of a child taking the estate, whether elder or not. (y) Thus the eldest daughter, or the eldest son being unprovided for, has frequently been held to be entitled under the description of a younger child.

As where a parent, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for *younger children*, appoints the estate to a younger son, the elder will be entitled to a portion under the trusts of the term; (z) and, by parity of reason, the appointee of the estate, though a younger son, will be excluded.

[The principle is that the elder shall be deemed a younger child, and the younger shall be deemed an elder in respect of the interests derived under a particular settlement or will. (a) So that if father and eldest son, tenant for life and in tail, execute a disentailing deed and acquire the fee-simple, a younger son cannot afterwards become an elder within the meaning of the rule; for the settlement is destroyed, and though he becomes eldest in fact, it can never give him the estate; and should he afterwards acquire the estate by a new title, as by descent or devise from the elder brother, yet as this will not be under the settlement, it will not exclude him from participating in portions provided by the will or settlement for younger children. (b) But the

(x) *Chadwick v. Doleman*, 2 Vern. 528; *Beale v. Beale*, 1 P. W. 244; *Butler v. Duncombe*, Id. 451; *Heneage v. Hunloke*, 2 Atk. 456; *Pierson v. Garnett*, 2 B. C. C. 38.

(y) *Bretton v. Bretton*, Freem. Ch. 158, pl. 204, 3 Ch. Rep. 1, 1 Eq. Cas. Ab. 202, pl. 18.

(z) *Duke v. Doidge*, 2 Ves. 203.

[(a) See per Wood, V. C., *Sing v. Leslie*, 2 H. & M. 87; per Lord Langdale,

Peacocke v. Pares, 2 Kee. 699.

(b) *Spencer v. Spencer*, 8 Sim. 87; *Macoubrey v. Jones*, 2 K. & J. 684, virtually overruling *Peacocke v. Pares*, 2 Kee. 689. *A fortiori* where the portions are for "children other than an eldest son entitled under the limitations contained in" the will or settlement. See *Sing v. Leslie*, 2 H. & M. 68. So where A was eldest son, but, in consequence of forfeiture incurred by his father, was not.

eldest son, who has concurred with his father in re-settling the property, will be excluded, if, by the re-settlement he takes back substantially what the settlement gave him; as a life-estate with remainder to his issue in tail, instead of the estate tail in himself; or the property burdened with a charge of which he has had the benefit. (c)

It was formerly doubted whether the rule applied to a legal devise of lands to younger children. (d) But in *In re Bayley's Settlement*, (e) it was applied to a legal limitation of lands by settlement to younger children as tenants in common *in tail*, on the ground that the same construction must be given to the words by courts of law as by courts of equity.]

Rule applies to devise of lands to "younger children."

But it should be observed, that where the portions are to be raised for *children* generally, the child taking the estate is allowed to participate; (f) [and where the will purports to exclude those only who come into possession of the estate, a child (or his executor) will not be excluded if he dies before coming into possession, although the estate devolves on his heir-in-tail.] (g)

The rule under consideration, however, applies only to gifts by parents or persons standing *in loco parentis*, and not to dispositions by strangers, in which the words *younger children* receive their ordinary literal interpretation, (h) [unless the context supplies actual evidence of an intention to adopt the rule. Thus in *Livesey v. Livesey*, (i) a testatrix bequeathed a nominal *legacy to "the eldest son of my daughter E who shall be living at my decease," declaring that she gave him no more because he would have a handsome provision from the estates of his grandfather and father. She then gave a moiety of the residue of her estate to the

Rule confined to parental provisions.

"entitled under the limitations of the will," he was not excluded from a portion, *Johnson v. Foulds*, L. R., 5 Eq. 268.

(c) *Collingwood v. Stanhope*, L. R., 4 H. L. 43. And see per Lord Selborne, *Meyrick v. Laws*, L. R., 9 Ch. 242.

(d) By Lord Hardwicke, *Heneage v. Hunloke*, 2 Atk. 457.

(e) L. R., 9 Eq. 491, 6 Ch. 590. In *Hall v. Luckup*, 4 Sim. 5, this construction was aided by the context. And see now the judicature act, 1873, § 25.]

(f) *Incleidon v. Northcote*, 3 Atk. 438.

[(g) *Wyndham v. Fane*, 11 Hare 287. Whether the word "entitled" (alone)

means entitled in possession, see *Chorley v. Loveband*, 33 Beav. 189; *In re Gryll's Trusts*, L. R., 6 Eq. 589; *Umbers v. Jaggard*, L. R., 9 Eq. 200.]

(h) See Lord Teynham *v. Webb*, 2 Ves. 197; *Hall v. Hewer*, Amb. 203; *Lady Lincoln v. Pelham*, 10 Ves. 166. [It is said, Sug. Pow. 680, 681 (8th ed.), that this distinction does not appear to be attended to at the present day; but it was recognized in *Wilbraham v. Scarisbrick*, 4 Y. & C. 116, 1 H. L. Cas. 167, and in *Sandeman v. Mackenzie*, 1 J. & H. 628.

(i) 13 Sim. 33, 2 H. L. Cas. 419. See also *Lyddon v. Ellison*, 19 Beav. 565.

children of E “(except her eldest son or such of her sons as shall by the death of an elder brother become an eldest, it being my will that the son who is or shall become an eldest son shall not be entitled to take anything under this devise) equally to be divided among them when the youngest shall attain twenty-one.” By a subsequent clause, if all the children but one, a daughter, should die under twenty-one, she also excepted that daughter. The eldest son at the decease of the testatrix was provided for as mentioned by her. He died before the second son attained twenty-one; but the latter, although he had thus become the eldest son, did not succeed to the provision made for his elder brother; he therefore contended that he was entitled to a share of the residue, since the declared motive for excluding the eldest was inapplicable to him. But it was held that he was not so entitled; it might be that the motive was as alleged; but if so, the testatrix should have excluded not any son who might at any time have become an eldest son, but (in the terms of the former clause) the eldest son, or such other son as should be eldest at the time of her death: besides, she had excluded the eldest daughter, for whom no provision was made by the grandfather’s will: “eldest” must therefore be read in its ordinary sense, and without reference to the succession to property.

Nor is every gift by a parent a parental provision within the meaning of the rule. The ground of the rule is that an intention is manifested to provide for *all* the children without permitting any one child to take a double provision at the expense of another. (*k*) Generally the same instrument settles the estate and provides the portions; or the instrument providing the portions refers on the face of it to the instrument which settles the estate. (*l*) If the will of a parent provides only for *younger children and no provision appears to have been made for the eldest, the ground of the rule fails, and “younger children” must, it would seem, be literally construed.

(*k*) See per Lords Hatherley and Westbury, *Collingwood v. Stanhope*, L. R., 4 H. L. 52, 55, 57.

(*l*) As in *Collingwood v. Stanhope*, *sup.*; In re Bayley’s Settlement, L. R., 9 Eq. 491, 6 Ch. 590; and (by implication) in *Bathurst v. Errington*, 4 Ch. D. 251, 2 App. Cas. 698. In the last case, a shifting clause was to take effect if A, B or C, described as second, third and fourth sons of “Sir T. M. of H. in the county

of C., Bart., should become the eldest son of the said Sir T. M.,” and this was held (overruling *Jessel*, M. R.,) to imply “eldest son and as such heir apparent to the title and to the family estate.” It followed that the event must happen if at all in the lifetime of the father. A distinction was drawn between “eldest son” *quoad* the father and “eldest son” *quoad* the brothers.

In the case of *Wilbraham v. Scarisbrick*, (m) a father devised his estates A, B and C, for the benefit of his children, giving to the eldest and his issue estate A, to the second and his issue estate B, and estate C to the third son and his issue, with remainders in each case to the testator's other sons and daughters, and a clause shifting estate C away from the third son if he should become entitled to estate B, and any *younger* son should be then living; the second son having died in the testator's lifetime, the third son became entitled to estate B, and it was then contended that estate C went over to the eldest son, as being younger in regard to the limitations of that estate, though elder by birth. But it was held that the natural sense of "younger" was younger in order of birth; the devise was not a provision by a parent for his family, but an attempt to found three families; and that as there was nothing in the will to show that it was more in accordance with the testator's intention that when that attempt failed the eldest son should have estates A and C, than that the third should have B and C, the word could not be understood in the sense contended for.]

It may be observed, that a bequest to "the youngest child of" A has been held to apply to an *only* child. (n) [An only son has also been held to be excluded by an exception of "the eldest son" from a devise to "second, third, and other sons."] (o)

Only child held to take as youngest child.

Another question, which has been much agitated in construing gifts to younger children, respects the period at which the objects are to be ascertained. 29

As to period of ascertaining who are "younger children."

It is clear that an immediate devise or bequest to younger children applies to those who answer the description at the death of the testator, there being no other period to which the words can be referred. (p)

Immediate gifts.

(m) 1 H. L. Cas. 167.]

(n) *Emery v. England*, 3 Ves. 232.

(o) *Tuite v. Bermingham*, L. R., 7 H. L. 634.

29. In *Eastwood v. Lockwood*, 3 L. R., Eq. 487, a limitation over on the death of any son without issue, to the "next surviving son," was intended for the next *younger* son; and an oldest son, though otherwise provided for in a will, will be included in a gift to testator's other sons and daughters by name, "and such other

children as might be living" at his decease or born after, *Tavernor v. Grindley*, 32 L. T. R. (N. S.) 424 (1875.). See also *Brailsford v. Heyward*, 2 Desaus. 18, where a devise to "my youngest child that shall attain the age of 21 years" went, on the death of the youngest two before that age, to the next in age on his reaching twenty-one.

(p) *Coleman v. Seymour*, 1 Ves. 209. [So, a gift to "unmarried" daughters. *Jubber v. Jubber*, 9 Sim. 503.]

It might seem, too, not to admit of doubt upon principle, that where a gift is made to a person for life, and after his decease to the younger children of B, it vests at the death of the testator in those who then sustain this character, subject to be divested *pro tanto* in favor of future objects coming *in esse* during the life of the tenant for life.

*In *Lady Lincoln v. Pelham*, (q) the bequest was to A for life, and, after her death to her children; and, in case she should have none, or they should all die under twenty-one, then to the *younger children of B*; and A having no child, the younger children of B at the death of the testator were held entitled to a vested interest. Lord Eldon, however, seems to have thought that this construction was aided by the terms of another bequest; and he laid some stress on the circumstance, that the bequest did not proceed from a parent, or one *in loco parentis*.

In regard to parental provisions of this nature, certainly a peculiarity of construction seems to have obtained, the leading authority for which is *Chadwick v. Doleman*, (r) where a father, having a power to appoint portions among his younger children, to be raised within six months after his death, by deed appointed £2600, part of the entire sum, to his son T., describing him as his second son. No power of revocation was reserved. T. afterwards became an elder son, whereupon the father made a new appointment in favor of another son; and the Lord Keeper Wright held that the second was valid, the first appointment being made upon the tacit or implied condition of the appointee not becoming an elder son before the time of payment. 30

It should seem, then, that a gift by a father or a person assuming the parental office, in favor of younger children, is, without any aid from the context, to be construed as applying to the persons who shall answer the description at the time when the portions became payable. The object of thus keeping open the vesting during the suspense of

(q) 10 Ves. 166.

(r) 2 Vern. 528. See also *Loder v. Loder*, 2 Ves. 531; *Broadmead v. Wood*, 1 B. C. C. 77; *Savage v. Carroll*, 1 Ba. & Be. 265; [*Macoubrey v. Jones*, 2 K. & J. 692. It is immaterial that an appointment is made to a child by name, *Broadmead v. Wood*, 1 B. C. C. 77; *Savage v.*

Carroll, 1 Ba. & Be. 265. In *Jermyn v. Fellows*, Cas. temp. Talb. 93, a child named in the power as an object did not lose his share as younger child, though he afterwards became eldest; but as to this case, see *Sug. Pow.* 679 (8th ed.)

30. See *Wms. Ex'rs* (6th Am. ed.) 1179; *O'Hara on Int. of Wills* 313.

payment, probably is to prevent a child from taking a portion as younger child, who has become, in event, an elder child, and also, perhaps, to prevent the inheritance (which is often charged with portions to younger children) from being burdened with the payment of portions which are not eventually wanted.

Thus, suppose lands to be devised to A for life with remainder to his first and other sons in tail, charged with portions to his younger children [to vest at twenty-one but not to be paid *until the death of A. A has several sons, who all attain twenty-one in his lifetime. The eldest then dies in A's lifetime without issue: the second son having thus become the eldest, and as such entitled to the estate, will not take a share of the portions, (s) but the representatives of the deceased eldest son will. (t) It would be otherwise if the eldest son left issue, (u) or had joined his father in barring the entail so as substantially to enjoy the estate; (x) for the second son would not in either

(s) *Ellison v. Thomas*, 1 D., J. & S. 18 (trust for "children other than an eldest son for the time being entitled in possession"), *Swinburne v. Swinburne*, 17 W. R. 47 (a similar trust); *Davies v. Huguenin*, 1 H. & M. 730 ("children other than an eldest son"); *In re Bayley's Settlement*, L. R., 9 Eq. 491, 6 Ch. 590 ("all sons except eldest.") **Eldest son excluded by name.**—In *Wood v. Wood*, L. R., 4 Eq. 48, where personalty was bequeathed in trust for the testator's son A for life, remainder in strict settlement for "F the eldest son of A," and the children of F, and in default of children for F's younger brothers and their children; and a share of residue was given to the children of A "except F:" the case was treated as one of parental provision; but the rule was held not to apply, the exclusion being considered personal and not applicable to a younger brother who by A's death had become eldest.

No refunding of portion properly advanced to a younger child.—In *Leake v. Leake*, 10 Ves. 477, there was a proviso that if any younger child should be advanced by its parent, such advance should go in satisfaction of its portion; a younger child having been advanced was not com-

pelled to refund on becoming eldest. In *Glyn v. Glyn*, 3 Jur. (N. S.) 179, 26 L. J., Ch. 409, a clause excluding an eldest son from a share of *residue* in case he became entitled to the family estate, was held not to operate *after* the time for distributing the residue had arrived. See also *Stares v. Penton*, L. R., 4 Eq. 40.

(t) *Ellison v. Thomas* and *Davis v. Huguenin*, *sup.*; which appear to overrule *Gray v. Earl of Limerick*, 2 De G. & S. 370, at least as a general authority. In *Ellis v. Maxwell*, 3 Beav. 594, where the estate was entailed first on A and his issue, and, failing them, on B and her issue, and B had children, but A as yet had none, it was held that B's eldest son had not, while he continued first remainderman, an indefeasible right to a younger child's portion; but it was said by Lord Langdale that if A had a son born, B's eldest son would acquire a younger child's rights.

(u) See per Wood, V. C., 2 K. & J. 698. This confirms the author's opinion expressed 1st ed., II., 119, n.

(x) *Collingwood v. Stanhope*, L. R., 4 H. L. 43. See also *Bathurst v. Errington*, 4 Ch. D. 251, 2 App. Cas. 698 (shifting clause.)]

case have become eldest within the rule, namely, the son taking the estate.]

In *Windham v. Graham* (y) it was held that an express limitation over, in case of a younger son becoming the eldest before the age of twenty-one, prevented his being excluded by becoming the eldest under other circumstances, by force of the often-cited principle, *exclusio unius est inclusio alterius*. [But the court did not rely solely on this ground, and In re Bayley's Settlement decides that it will not generally authorize a departure from the rule, but may be referred to the event of a younger son who is under age at the period of distribution dying after that period without attaining the age.]

*Shutting out of view these particular cases of parental provision

Whether objects of non-parental gift must sustain the character at period of distribution.

(the propriety of which it is too late to question,) and applying to bequests to younger children the principles established by the cases respecting gifts to children in general, it would seem, that, in every case of a future gift to younger children, whether vested or contingent, provided its contingent quality did not arise from its being limited in terms to the persons who should be younger children at the time of distribution, (z) or any other period, the gift would take effect in favor of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded by becoming an elder before the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Thus, in *Hall v. Hewer*, (a) A having devised lands to trustees, to raise £6000, afterwards wrote a letter (which was proved as a codicil) to J., one of his trustees, which contained the following passage:—"I have given you and W. a power to mortgage for payment of £6000, and I beg that that sum may be lent to W., and that you will take such securities from him as he can give, to indemnify you and your children from payment of it; and in case of your death without children, I desire it may be secured to the younger

(y) 1 Russ. 331, cited again *infra*, p. L. R., 9 Eq. 496, acc.

*211. The case arose on the construction of a marriage settlement, but the principle seems not to be different on that account; [and see per Romilly, M. R., (z) *Livesey v. Livesey*, 13 Sim. 33, 13 Jur. 371, n., 2 H. L. Cas. 419.]

(a) Amb. 203.

children of W." Lord Hardwicke held that the £6000 did not vest until the death of J. ; [then, and not till then, it became a charge ;] and vested then in such persons as were at that time younger children of W. ; and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

In *Ellison v. Airey* (b) £300 was bequeathed to E, to be paid at her age of twenty-one or marriage, and interest in the meantime for her maintenance and education ; but if she died Ellison v. Airey. before twenty-one or marriage, then to the *younger children of testatrix's nephew F*, equally to be divided to or among them, the eldest son being excluded from any part thereof. Lord *Hardwicke was of opinion that it meant such as should be younger children at the death of E before twenty-one or marriage, *the legacy being contingent until that period.*

But as the fact of their being younger children at the period of distribution was no part of their qualification, could it properly form a ground for varying the construction? In Remarks on Hall v. Hewer and Ellison v. Airey. the case of a devise to A in fee, and if he die under twenty-one, to B, it has long been established that B takes an executory interest, transmissible to his representatives, (c) and it cannot be material whether the executory devise is in favor of a person *nominatim*, or as the member of a class upon whom the interest has devolved at the death of the testator, or at any subsequent period before the happening of the contingency. (d)

It does not appear that *Ellison v. Airey* involved the application of the peculiar rule respecting parental provisions, or that Lord Hardwicke so regarded it ; [any more than *Hall v. Hewer*, which he expressly noticed was the case of a stranger, and not between parent and child :] nor is it even clear that he considered the construction exclusively applicable to gifts to younger children ; for it will be remembered that in *Pyot v. Pyot* (e) he laid down the rule generally, that an executory or contingent gift to persons by a certain description,

(b) 1 Ves. 111. This case has been frequently cited in the present chapter as an authority for admitting children born before the time of distribution. As such, it is unquestionable, and has always been regarded as a leading case ; but this is quite distinct from the point now under consideration.

(c) *Goodtitle v. Wood*, Willes 21.

(d) As to the general distinctions between gifts to classes and individuals, see *ante* ch. XI.

(e) *Ante* *142.

applied to such of them only as answered the description at the happening of the contingency. If there is any such rule, of course the cases under consideration do not exist as a distinct class. [But there is no such general rule.] (f) We are too much in the dark as to the ground of decision in *Hall v. Hewer*, and *Ellison v. Airey*, to found any general conclusion upon those cases, nor, on the other hand, is it safe wholly to disregard them. [It seems probable that the former turned, partly at least, on the rule which then prevailed, that a legacy charged on land was in no case to be raised if the legatee died before the time of payment.] (g) And with regard to the latter, it is worth observing that no child of F was excluded by the construction adopted; for none died before E, E herself dying the day after the testatrix. No child was born in that short interval; but there was one born after the death of E, who claimed a share. The only points decided in the case were that the class (younger children) was not confined to those living at the date of the will, so as to *exclude one who was born between that date and the death of the testatrix, but that it did not include the child born after the death of E.] (h)

Exception of elder son at the time of distribution.

It is clear, however, that an express exclusion of the son who shall be elder *at the time of the death of the tenant for life*, will have the effect in like manner of restricting a gift to younger children to such as shall *then* sustain the character. (i)

Expression "an elder son" construed to mean elder son at time of distribution.

Matthews v. Paul.

And the same construction was given to the expression "an eldest son," in *Matthews v. Paul*, (k) which deserves some consideration. A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and after her decease to P. her husband for his life, and after his decease upon trust to transfer the said stock unto all the children of M, if more than one (*except an eldest son*) share and share alike, *the same to be vested interests* and transferable at *their, his or her ages or age of twenty-one years*, and in the meantime to invest their respective shares of the dividends for such children's future benefit; and in case any such children or child should die under the said age, leaving any children or child, then the share of every such child to go among their his or her children; otherwise to go to the survivors or survivor, and to be transferable in like manner as their

[(f) Per Turner, L. J., *Bolton v. Beard*, 3 D., M. & G. 612.

(g) *Ante* p. *834.]

[(h) R. L. 1747 A. fo. 700 b.]

(i) *Billingsley v. Wills*, 3 Atk. 219.

(k) 3 Sw. 328.

original share; and in case M. should leave no children or child at her decease, or, leaving such, they should all die under the age of twenty-one years without children as aforesaid, then over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stocks, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one (*except an eldest son*) equally, share and share alike; and if but one, then the whole to such one or only child, the same to be vested interests and transferable at such times and in such manner as the bank stock thereinbefore given. One of the younger children became an elder between the periods of the death of the testatrix and the expiration of the imperial annuities, but before any younger child had attained twenty-one, which raised the question as to the point of time to which the exception of an elder son was referable. Sir T. Plumer, M. R., held, first, that the shares vested when one *of the younger children attained twenty-one, and not before. With respect to the period at which the phrase, "an eldest son" was to be applied, he considered that three different times might be proposed; the date of the will, the death of the testatrix, and the time when the fund was directed to be distributed. After showing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies payable to a class of persons at a future period, the constant rule has been, that all persons coming *in esse*, and answering the description at the period of distribution, should take.³¹ The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.³²

Time of vesting.

"Eldest son," to what period referable.

But it is to be observed, that though in gifts to children, the time of distribution is the period of ascertaining the number of objects to be admitted, yet it is not necessary to wait until this period in order to see whether children living at the death of the testator, or at any other period to which the vesting is expressly postponed, be objects or not; and it would seem, therefore, upon the prin-

Observations upon Matthews v. Paul.

31. See *Miles v. Boyden*, 3 Pick. 213; (with other gift to F and remainder to the other sons of A), was not extended, on F's death before A, to A's second son, although an exclusion of "F the eldest son of A" he took the other gift.

32. In *Wood v. Wood*, 4 L. R., Eq. 48, he took the other gift.

ciple of his Honor's own reasoning, to be equally unnecessary to wait until the period of distribution, in order to know whether an elder son, in existence at the time of the vesting, would be excluded. In the case of a gift to A for life, and after his death to the children of B, to vest at twenty-one, it may be affirmed of every child who has attained twenty-one in the lifetime of B, that he is an object; (l) and, by parity of reasoning, it would seem to follow that if any child who would, but for the clause of exclusion, have been an object, comes *in esse*, the exception is ascertained to apply to him..(m)

It is singular, that though the M. R. took some pains to show that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator, yet he never once addresses himself to the inquiry, whether *the period of vesting* was not that to which the term "eldest son" was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord Eldon to a bequest to younger children, in **Lady Lincoln v. Pelham*, that this *was* the period of ascertaining the individual upon whom the character of eldest son had devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it. If the gift had been to A for life, and after her decease to an "eldest son" of A, to be vested and transferable when the younger children or child of A should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A or not, was absolutely entitled; and yet this is precisely *Matthews v. Paul*, substituting a gift for the exception. Another remark occurs on this judgment: that though at the outset his Honor treats the case as one in which the provision proceeded from a stranger (being by a grandmother in the lifetime of a parent, without any indication of an intention to stand *in loco parentis*,) yet he afterwards cites, in support of his decision, *Chadwick v. Doleman* and other cases of provisions by parents.

And here it may be remarked, that where there is a gift to the elder

(l) *Ante* *160.

(m) But if the *youngest* were excepted, it would obviously be necessary to wait until the period of distribution, in order

to know who would be the youngest, the exception embracing the last-born object of the class.

son in terms which would carry it to the eldest *for the time being*, and there is another gift in the same will to younger children generally, the latter will receive a similar construction, to prevent the same individual taking under each character. (n) Such seems at least to be the effect of *Bowles v. Bowles*, though in the judgment of Lord Eldon no general position of this nature is distinctly advanced.

Effect of gift to the elder son for the time being.

Indeed Lord Gifford, [even in a case which was within the rule regarding parental provisions,] (o) was of opinion that a declaration that the children attaining twenty-one, &c., in the lifetime of the parent should take vested interests, was sufficient to entitle a child who was a younger child at this period but subsequently became the eldest. This conclusion, it is conceived, goes far to support the doctrine which has been here contended for in opposition to *Matthews v. Paul*; for as the doubt is not as to the period of vesting, but whether such period is the time of ascertaining the object to be excluded, the declaration in question seems not to be very material. Besides, whatever is its effect, the declaration as to vesting in *Matthews v. Paul* seems to be equivalent in principle. The result of Lord Gifford's determination is, that in case of gifts to younger children, not involving the peculiar doctrine applicable to parental provisions, the time of vesting is the period of ascertaining who are to take under the description of younger children, and who is to be excluded as an elder child.

That this is the rule in regard to devises of real estate appears by *Adams v. Bush*, (p) where a testator devised freehold estate to his uncle A for life, remainder to the wife of A for life, remainder to all and every the child and children of A, *other than and except an eldest or only son*, and their heirs, and if there should be no such child *other than an elder or only son*, or being such, all should die under twenty-one, then over. At the death of the testator A had two sons, B and C; B died in A's lifetime, and it was contended that according to the cases respecting gifts to younger children, especially *Matthews v. Paul*, C was not entitled, as he did not answer the description of younger child when the remainder vested in possession; but on a case from chancery the court certified that [C took, on his father's death, an estate in fee

Exception of an eldest child referred to time of vesting in devise of real estate;

(n) *Bowles v. Bowles*, 10 Ves. 177. See *Sansbury v. Read*, 12 Ves. 175, where younger children were held to be entitled on a very obscure will. (o) *Windham v. Graham*, 1 Russ. 331, ante p. *206. (p) 8 Scott 405, 6 Bing. N. C. 164.

simple in possession defeasible on his dying under the age of twenty-one.

The same principle was applied to the construction of a settlement of personalty, in *In re Theed's Settlement*, (g) where the trusts of a sum of money were for H. for life, and if (as happened) he should have no child, then for M. for her life, and after her death to pay it to all the children of M. *except her eldest or only son*, in equal shares, at twenty-one. The eldest-born son died, and the second attained twenty-one, both in the lifetime of H. (who survived M.) and it was argued that the second son, being eldest at the period of distribution (H.'s death), was excluded by the exception; but it was held by Sir W. P. Wood that the interest which vested in him at twenty-one was not divested by his afterwards becoming eldest son.

These cases, and others to the like effect, (r) relieve the point of construction which has been the subject of discussion in the preceding remarks from much of the uncertainty which previously existed, [and decide that in cases not within the peculiar rule regarding parental provisions the time of vesting is the time for ascertaining the class entitled under devises and bequests to younger children. They do not indeed cover the precise point which appears to have arisen in *Hall v. Hewer* and *Ellison v. Airey*, viz., that of a transmissible contingent interest; but *the doubts expressed above, concerning the soundness of those authorities, are strongly confirmed by the decision in *Bryan v. Collins*, (s) where a testatrix bequeathed a legacy in trust for the eldest daughter of M. D., to be paid when she attained her majority, and if there should be no such daughter, then to the *eldest daughter* of G. B., payable in like manner: G. B. had a daughter A., who was born soon after the death of the testatrix, but died in 1827, and another daughter B., who was still living; and M. D. having died unmarried in 1851, the second daughter claimed to be the eldest within the meaning of the will, but Sir J. Romilly, M. R., decided that the legacy vested in A. at her birth, liable only to be divested on the birth of a daughter to M. D.

The context, however, may show an intention that the class to be

—in a settlement of personalty. (g) 3 K. & J. 375.

(s) 16 Beav. 14. See also *Lady Lincoln*

(r) *Adams v. Adams*, 25 Beav. 652; *v. Pelham*, *sup.* p. *205.

Sandeman v. Mackenzie, 1 J. & H. 613.

included, or the individual to be excluded, shall be determined at the time of distribution, and not at the time of vesting. Thus, where the gift was to A for life, with remainder to the two eldest children B, C and D respectively, the two eldest living at the death of A were held to be entitled by reason of a gift over in case there should be only one child *then* living. (t)

—not where context shows contrary intention.

As in a gift to younger children, or in an exception of the eldest son, so also in a gift to the eldest or to the first or second son of A, the reference is *prima facie* to the order of birth. (u) ³³ But of course this construction is excluded if at the date of the will the first (or second) born son is to the testator's knowledge dead, (v) or if he speaks of a son who is not first-born "becoming eldest," (x) or of the eldest at a given period, (y) or for the time being. (z)

If at the date of the will a son is living who answers the description he takes as *persona designata*; (a) so that if he dies before the testator the gift lapses; (b) unless it is within the protection given by stat. 1 Vict., c. 26, §§ 32, 33; (c) or unless *the testator has, in the event, disposed of the subject otherwise, as in *Thompson v. Thompson*, (c) where a testator gave a share in his property to the eldest son of his sister A, and another share to the eldest son of his sister B, and it appeared that each sister had living at the date of the will an eldest son, and other children, but that the eldest son of A died before the date of a codicil whereby the testator

"First" son living at date of will takes as *persona designata*.

(t) *Madden v. Ikin*, 2 Dr. & Sm. 207. See also *Stevens v. Pyle*, 30 Beav. 284; *Harvey v. Towell*, 7 Hare 231, better rep. 12 Jur. 242; *Livesey v. Livesey*, 13 Sim. 33, 2 H. L. Cas. 419; and see *Cooper v. Macdonald*, L. R., 16 Eq. 272.

(u) 2 Vern. 660; 12 Ch. D. 170; 2 Dr. & Sm. 275.

33. A life estate to "the first son of the body of A on the body of B begotten," remainder to the second and other sons of A to be begotten, goes in default of sons of A by B to the eldest son of A by a second wife, *Blake's Estate*, 19 W. R. 765.

(v) *King v. Bennett*, 4 M. & Wel. 36.

(x) *Bathurst v. Errington*, 2 App. Cas.

698, 709 (shifting clause.)

(y) *Livesey v. Livesey*, 13 Sim. 33, 2 H. L. Cas. 419.

(z) *Bowles v. Bowles*, 10 Ves. 177.

(a) *Meredith v. Treffry*, 12 Ch. D. 170; *Saunders v. Richardson*, 18 Jur. 714 (settlement.)

(b) *Per Hall, V. C., Meredith v. Treffry*, *sup.*

(c) *Id.* But as to implying an estate tail from the gift over "in default of issue male" (as was there suggested), *vide post* ch. XLI., § 4.

(c) 1 Coll. 388. See *Perkins v. Micklethwaite*, *ante* Vol. I., p. *200; cf. *Id.*, p. *323.

(who knew of A's death) bequeathed a legacy to all the children then living of A and B, except the two provided for in the will. Sir J. K. Bruce, V. C., without saying what he might have thought right, had the codicil not existed, held that the eldest son of A who survived the testator became entitled under the bequest.

If the gift be to the "first," or the "second," son, and there is no son who answers the description living at the date of the will, or at the time of the testator's death, the first who afterwards comes *in esse* and answers the description is entitled. Thus, in *Trafford v. Ashton*, (*d*) where a testator, about the time of his daughter's marriage, devised his estate in trust for her for life, remainder to the second son of her body in tail male, and so to every younger son; and added, that he did not devise the estate to the eldest son, because he expected his daughter would marry so prudently that the eldest son would be provided for; Lord Cowper said the *second* son was the second in order of birth, and held such son to be entitled, though not born until after the death of the first.

But a son who comes into existence after the date of the will, and dies before the testator, is not reckoned. Thus, in *Lomax v. Holmden* (*e*) a testator devised land to the first son of C in tail, remainder to his second and other sons (without words of limitation,) and in default of such issue, over.

At the date of the will C had no son, but afterwards had one who died before the testator, and then another, A, who was the eldest son living at the testator's death. Lord Hardwicke decided that A took the estate; because "the making and the death only, not the intermediate time, were to be regarded in construing wills," and the idea that the testator meant a first son in being at the date of his will was excluded by the fact that there was then no son of C.

So, in *King v. Bennett*, (*f*) where, after successive life estates *to A and her husband B, the testator devised lands to their second son in fee, and it appeared that of three sons which A and B had had, the third alone survived at the date of the will; that they afterwards had a fourth son, who died in the testator's lifetime; and subsequently a fifth, who survived him; it was held, upon the principle of the last

(*d*) 2 Vern. 660. See also *Alexander v. Alexander*, 16 C. B. 59; *Bennett v. Bennett*, 2 Dr. & Sm. 266; *Driver v. Frank*, 3 M. & Sel. 25, 8 Taunt. 468. (*e*) 1 Ves. 290. (*f*) 4 M. & Wel. 36.]

case, that the fifth son, being second at the date of the testator's death, took under the devise. It was thought clear that the testator did not mean the second in order of birth, because at the date of the will that son had died.]

In *West v. Primate of Ireland*, (g) Sir Septimus R. desired that his executor would, at his (the executor's) decease, bequeath 1000 guineas to Lord C. "for the use of his seventh, or youngest child *in case he should not have a seventh child living.*" At the date of the will Lord C. had six children living; [and had had a seventh who had died, but it did not appear that the testator knew of this:] at the death of the executor, he had ten. The executor bequeathed the money in the words of the original will, and Lord Thurlow held that the [seventh child living at the executor's death, being in fact the eighth born, could not take by the description of seventh child, and decreed in favor of the youngest child then living.] (h)

The present chapter will be concluded with the case of *Langston v. Langston*, (k) which is remarkable for the great difference of opinion that existed in regard to the true construction of the will. The question was, whether the first son of the testator's son A was excluded under a clause which directed trustees to convey to him (A) for life, with remainder to trustees to preserve, with remainder to the second, third, fourth, fifth, and all and every other son and sons of A successively, as they should be in seniority of age and priority of birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. The eldest son of A claimed an estate tail male expectant on the decease of A. The Court of K. B., on a case from chancery, certified that he took no estate. Sir J. Leach, M. R. (being, as it should seem, dissatisfied with this opinion), sent a case to the judges of C. P., who certified that the first son of A took an estate tail male, and the M. R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the court below. Lord Brougham founded his conclusion, that the eldest

Bequest to
"seventh or
youngest
child,"
seventh sur-
viving, but
eighth born,
held not enti-
tled.

Devise to first
son supplied
by implication
from the entire
will.

(g) 2 Cox 258, 3 B. C. C. 148.

(h) But did not the language of the bequest import that the youngest was only to become entitled in case there was no

seventh child at the time of ascertaining the object?

(k) 8 Bligh (N. S.) 16, 2 Cl. & Fin. 194.

son took an estate tail male [immediately after the death of A (1) partly] upon the general context of the will, in which various terms of years and limitations were made dependent on the existence or non-existence of an eldest son, in a manner which rendered them in the highest degree absurd if the eldest son took no estate, and he even considered that the language of the particular devise itself bore out the construction, as the words "other" sons extended to the whole range, including the eldest. (m) "But it is said," he observed "that 'other' always means 'younger,' 'posterior,' and I leaned at first towards this view of the subject; it is a very plausible argument, and in ordinary cases it is true in point of fact. If you were to say (in the usual way) first, second, third, fourth, and *other* sons, 'other' must mean the sons after the fourth. But why does it mean those after the fourth? Only because you had before enumerated all that come before the fourth, for you had said first, second, third, and fourth. But suppose you had happened to omit the first, and instead of saying first, second, third, fourth, and *other* sons, you had said second, third, fourth, and *other* sons, leaving out the first, then it is perfectly clear that 'other' no longer is of necessity confined to the fifth, sixth, and seventh; but rather, *ex vi termini*, includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth. The word 'other' would then just as grammatically, as strictly, and as correctly, describe the first as the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why 'other' in all ordinary cases, and in the common strain of conveyancing, means a younger son, is, that no one ever thinks of leaving out the elder. If it were the custom to leave out the elder and to begin with the second, then 'other' would of course always suggest to one's mind the idea of the unnamed elder son, as well as the unnamed younger sons." 34

Devise to second and other sons includes the first, *semble*.

[(1) If he took at all the context showed he took in priority. In *Eastwood v. Lockwood*, L. R., 3 Eq. 495, it was said that without an explanatory context it was doubtful whether "next survivor according to seniority" (among brothers) meant next elder or next younger.

(m) See *ante* ch. XVI., § 1.]

34. The following general rules may be considered as established :

1st. Gifts to a *first* or *second* son. If such a son exists at the date of the will, he will take as a *persona designata*.

If such a son has lived and is dead at the date of the will, or is not born until after the date of the will and dies before the testator, the son answering the description at testator's death will take.

2d. Gifts to the *eldest* or *elder* son. He is to be ascertained in general at the tes-

tator's death, if the estate vests then and a contrary intention does not appear in the will. But in gifts by a testator acting *in loco parentis*, he who takes the bulk of the estate is generally intended by the term and is to be ascertained at the time of distribution—and he will not then be excluded as such, if he does not take the estate on account of which the exclusion was made.

3d. Gifts to *younger* children or sons.

The rules for ascertaining the person are the same as above given for ascertaining the elder son. Where the elder son is excluded as the taker of the bulk of an estate, the younger son, becoming the elder by his brother's death, will be excluded.

4th. The "eldest son" may be the only son and he may take under the description of "second and other sons," if it is evident that he has been left out by mistake. See Theobald on Wills, pp. 120-125.

* CHAPTER XXXI.

DEVICES AND BEQUESTS TO ILLEGITIMATE CHILDREN.

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|---|---|
| I. <i>Children in existence when the Will is made, capable of taking. What is a sufficient description of them.</i> | II. <i>Gifts to Children en ventre.</i> III. <i>Gifts to Children not in esse.</i> IV. <i>General Conclusions from the Cases.</i> |
|---|---|

I.—ILLEGITIMATE children, born at the time of the making of the will, may be objects of a devise or bequest, by any description which will identify them. (a) Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact* (for that the law will not inquire into,) *but the reputation of the fact*, which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty.

For, let it be remembered that, though illegitimate children *in esse* may take under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters or issue, imports, *prima facie*, legitimate children or issue, excluding those who are illegitimate, agreeably to the rule, "*Qui ex damnato coitu nascuntur, inter liberos non computentur.*" (b) Nor will expressions or a mode of dis-

(a) *Metham v. Duke of Devon*, 1 P. W. 529.

(b) *Hart v. Durand*, 3 Anst. 684, *post* p. *223. See also *Cartwright v. Vawdry*, 5 Ves. 530. *Harris v. Stewart*, cit. 1 Ves. & B. 434; [*In re Ayles' Trusts*, 1 Ch. D. 282; *Ellis v. Houstoun*, 10 Ch. D. 236. In construing the will of a domiciled Englishman, the question of legitimacy is to be determined by English law, *Boys*

v. Bedale, 1 H. & M. 798; In *re Wilson's Trusts*, L. R., 1 Eq. 247, 3 H. L. 55 (*nom. Shaw v. Gould*.) Otherwise as to the will of a domiciled foreigner, *Barlow v. Orde*, L. R., 3 P. C. 164. See also *Story Conf.*, § 484. A surrender of copyholds to the use of a will was never supplied in equity in favor of illegitimate children, *Fursaker v. Robinson*, Pre. Ch. 475; *Tudor v. Anson*, 2 Ves. 582.]

position affording mere conjecture of intention be a ground for their admission.¹

This is, well illustrated by *Cartwright v. Vawdry*, (c) where A having four children, *three legitimate and one illegitimate* (the latter being an ante-nuptial child of himself and his wife,) *bequeathed to *all and every such child or children*,

Not extended to illegitimate children upon mere conjecture.

1. In general, illegitimate children are not included in the word children, *Bennett v. Cane*, 18 La. Ann. 590; *Heater v. Vanauken*, 1 McCart. 159; *Gardner v. Heyer*, 2 Paige. 11; *Collins v. Hoxie*, 9 Paige 81; *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 479; *Kirkpatrick v. Rogers*, 6 Ired. Eq. 135; *Gibson v. Moulton*, 2 Disney (Ohio) 158; *Shearman v. Angell*, 1 Bailey Eq. 351; *Ferguson v. Mason*, 2 Sneed (Tenn.) 618. So *Megson v. Hindle*, W. N. 1880, p. 11 (Ch. D.), although another gift in the same will to the parent of the illegitimate children (who was herself illegitimate) described her as "my daughter." "Natural children, having acquired the reputation of being the children of a particular person, prior to the date of the will, are capable of taking under the description of 'children.' And they may take in classes of children 'legitimate or illegitimate.' But the will itself must show the testator's intention to include them under this description, either by express designation or by necessary implication. For otherwise the term child, son or issue must be understood to mean *legitimate* child, son or issue. And no extrinsic evidence can be received, except to prove the fact of illegitimate children having at the date of the will acquired the reputation of being the children of the testator or the person named in the will and that the testator knew that fact and the state of the family. Again it is a rule (though not an invariable one) that wherever the general description of children in a will will include legitimate children, it can-

not be extended to illegitimate children : in other words, where there are legitimate children to answer the description of 'children,' the rule of law is that legitimate children only will take." *Wms. Ex'rs* (6th Am. ed.) 1184. In *Hughes v. Knowlton*, 37 Conn. 429, it was held that "all the children that have been or may be born of the bodies" of testator's daughters, includes illegitimate children. So in *Gelston v. Shields*, 16 Hun 143, a devise to "my beloved wife Catharine," with remainder to "my children who shall survive me," appointing said Catharine guardian for them, was held intended for the eight children of Catharine, notwithstanding that he had a former wife, Jane, still living, and two children by her, and that the marriage with Catharine was void. And illegitimate children can take under a will as children, when they are particularly designated, *Pratt v. Flamer*, 5 Harr. & J. 10; *Dane v. Walker*, 109 Mass. 179; *Stewart v. Stewart*, 4 Stew. (N. J.) 399; or where they must be intended, there being no others, *Gardner v. Heyer*, 2 Paige 11; and parol evidence has been admitted to show such intention where there were other legitimate children, *Powers v. McEachern*, 7 S. C. 290; but such intention will not be inferred from a gift to testator's daughter "or her issue," she having at the time only illegitimate children, *Doggett v. Moseby*, 7 Jones L. 587. A statute legitimating a bastard will give him no capacity of inheriting if his father is not named in the act, *Lee v. Shankle*, 6 Jones L. 313. But when so legitimated a bastard can take as

(c) 5 Ves. 530.

as he might happen to leave at his death, for maintenance until twenty-one or marriage, and then in trust to pay *such child or children one-fourth* part of the income of his estates; but in case there should be only one such child who should attain that age or marriage as aforesaid, then to pay the whole income to such only child, if the others should have died without issue: and there was a limitation to survivors in case of the death of any of the children under age, unmarried and without issue. It was contended that the distribution into fourths plainly indicated, that the illegitimate daughter was in the testator's contemplation, *there being four children including her* when the will was made, and that all the expressions applied to females, showing that he meant existing daughters, not future issue, which might be male or female. But Lord Loughborough decided against the illegitimate daughter. He said it was impossible that an illegitimate child could take equally with lawful children in a devise to children. This decision has been commended by Lord Eldon, who, in a subsequent case, addressing himself to the argument urged on behalf of the illegitimate daughter, (*d*) observed, "That the direction to apply the income in fourths only afforded conjecture; as if between the time of his will and his death one or two of these children had died, the division into fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the court to hold, by

Lord Eldon's
observations
upon Cart-
wright v.
Vawdry.

gitimate daughter, (*d*) observed, "That the direction to apply the income in fourths only afforded conjecture; as if between the time of his will and his death one or two

the "lawful issue," *Miller's Appeal*, 52 Penna. St. 113; and a father leaving such child cannot be held to have "died without an heir," *McGunnigle v. McKee*, 77 Penna. St. 81; *Carroll v. Carroll*, 20 Tex. 731. A general act, however, enabling bastards to inherit from their mother, is not retrospective, *Steckel's Appeal*, 64 Penna. St. 493. The statute of Illinois, providing that the property of a bastard shall go to the "mother and her children," the decedent's "next of kin," and such words include her illegitimate kindred and children, *Rogers v. Miller*, 5 Biss. C. C. 166; and in like statutes of other states, *Brewer v. Blougher*, 14 Pet. 178; and in the Connecticut statute of distributions the word "children" has

been held to include illegitimate children, *Heath v. White*, 5 Conn. 228; but not in Massachusetts, *Cooley v. Dewey*, 4 Pick. 93; nor in a statute providing for children omitted in a will, *Kent v. Barker*, 2 Gray 535; nor will the statute enabling an illegitimate child to inherit from its mother be extended to the child of such child, *Curtis v. Hewins*, 11 Metc. 294. And in Pennsylvania illegitimate next of kin cannot take under the statute of distributions, *Grubb's Appeal*, 58 Penna. St. 55; but they can in Vermont, *Burlington v. Fosby*, 6 Vt. 83.

(*d*) See judgment in *Wilkinson v. Adam*, 1 Ves. & B. 464, which is replete with learning on this subject.

necessary implication, that the illegitimate child was to take by implication with the others, as much as if she had been in the plainest and clearest terms *persona designata*; and my opinion is that this circumstance is by no means sufficient. The will would have operated in favor of all his children, however numerous they might have been, and in favor of subsequent legitimate children, even if every legitimate child he had before had died. *It was therefore impossible to say he necessarily means the illegitimate child; as it is not possible to say he meant those legitimate children.* That will would have provided for children living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence, it was impossible to raise the question. The will *itself furnished no question whether legitimate or illegitimate children were intended; the question upon which the court was to decide was furnished by matter arising out of, not in, the will."

These observations afford a more satisfactory explanation of the grounds of Lord Loughborough's decision, than is to be found in his own judgment. It will be useful to keep in view the circumstances of the case, and Lord Eldon's comment upon them, when we proceed to examine some later adjudications noticed in the sequel.

And it is clear that the fact of there being no other than illegitimate children when the will takes effect, or at any other period, so that the gift, if confined to legitimate children, has eventually failed for want of objects, does not warrant the application of the word "children" to the former objects.

Illegitimate children not let in merely from absence of other objects.

Thus, in *Godfrey v. Davis*, (e) where a testator, after giving certain annuities, desired that the first annuity that dropped in might devolve upon the "*eldest child* male or female for life of W." At the time the will was made W. had several illegitimate children, who were known to the testator, but no others; and he had no legitimate child then, or when the first annuitant died. (f) Sir R. P. Arden, M. R., held that there was not sufficient to entitle any of the illegitimate children; for, whatever the real intention of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were "*the eldest child*," *such persons only could be intended as could entitle themselves as children by*

(e) 6 Ves. 43.

ante p. *171.

(f) As to question arising out of this,

the strict rule of law; and no illegitimate child could claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended though in point of law not standing in that character.

So, in *Kenebel v. Scrafton*, (*g*) where a testator being unmarried directed that, *in case he should have any child or children by M.* (a woman with whom he cohabited,) a sum of money should be raised *for such child or children*; it was held that he contemplated a marriage with her, and making a provision for the issue of such marriage; and consequently that the will was not revoked by his marriage with M., (*h*) and the birth of a child. Lord Eldon, in reference to this case, (*i*) has said, "We *may conjecture that he meant illegitimate children if he did not marry, yet notwithstanding that may be conjectured, the opinion of the court was, as mine is, that *where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than make a provision for her and her children, he must be considered as intending legitimate children, as there is not enough upon the will itself to show that he meant illegitimate children*; and my opinion is, that *such intention must appear by necessary implication upon the will itself*."

Again, in *Harris v. Lloyd*, (*k*) a trust "for *all and every the child and children*" of the testator's son, was held not to apply to illegitimate children, though he had no other than illegitimate children at the date of the will, and these had always been treated and recognized by the testator as his grandchildren.

[And in *Warner v. Warner*, (*l*) where a testator bequeathed a share of the residue of his personal estate in trust for his son C for life, "after his death in trust for the maintenance of his wife and the education of his children; at his wife's death the principal to be equally divided among his children then living." At the date of the will C was living with a woman named M., who was not married to him, and

(*g*) 2 East 530; [see also *Dover v. Alexander*, 2 Hare 275; *Wilkinson v. Wilkinson*, 1 Y. & C. C. C. 657 (settlements.)]

(*h*) As to this, *ante* vol. I., p. *124.

(*i*) In *Wilkinson v. Adam*, 1 Ves. & B. 465. [See, however, *Id.* 456, 457.]

(*k*) T. & R. 310.

[(*l*) 15 Jur. 141. See also *Osmond v. Tindall*, 5 Ves. 534, c. n.; *Durrant v. Friend*, 5 De G. & S. 343; *In re Davenport's Trust*, 1 Sm. & Gif. 126; *In re Overhill's Trust*, *Id.* 362; *Kelly v. Hammond*, 26 Beav. 36; *Dorin v. Dorin*, L. R., 7 H. L. 568, stated *post*.

had by her four illegitimate children (who it was proved had always been called and treated by the testator as the children of C,) and no legitimate children; but Sir J. K. Bruce, V. C., observed that, assuming all those facts and the testator's knowledge of them, the question still was, whether, if the testator had meant that legitimate children only should take, he could have expressed himself more clearly than he had done. He observed that "wife," as here used, was "Wife." a name rather of the character than of the individuality, and decided that the illegitimate children were not entitled.](*m*)

So, in *Mortimer v. West*, (*n*) where a testator, after bequeathing an annuity to his wife and M. (a woman with whom he lived,) created a trust of his real and personal estate in favor of certain illegitimate children of M. by himself, naming them, and describing them as the children of M., together with every *other* child born of the body of the said M.; it was held, that this *description did not embrace two illegitimate children of M. born subsequently to the will and before the execution of a codicil (which was contended to be a republication of the will, thereby bringing the terms of the description down to the date of the codicil;) Lord Lyndhurst, C., being of opinion that there was nothing to show by necessary implication that the testator intended the bequest to be to illegitimate children.

And even if the testator, in such codicil, recognize as his own an illegitimate child born since the execution of his will, this is not sufficient to entitle such child to claim under a bequest in the will in favor of the future children of the testator by a particular woman. (*o*)

Recognition of an illegitimate child in a subsequent codicil not sufficient.

But the strongest case of this kind is *Bagley v. Mollard*, (*p*) where a testator gave the residue of his property equally between the children of his son W. and of two other children; and it was held that an illegitimate child of W. was not entitled to share in the residue; *though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son.*

Or even in the will itself.

In all the preceding cases, [the terms of the gift were perfectly satis-

(*m*) As to the effect upon the meaning of the word "children" of a clear reference to the individual by name as well as by character, as "A the wife of B," A not being the lawful wife of B, see *Hill v. Crook*, L. R., 6 H. L. 265, 285, stated

post.

(*n*) 3 Russ. 370.

(*o*) *Arnold v. Preston*; 18 Ves. 288.

(*p*) 1 R. & M. 581. [But see *Owen v. Bryant*, 2 D., M. & G. 697, *post.*]

Principle not varied by the fact of testator being unmarried.

fied by referring them to legitimate children only;] and this (according to the principles of construction already laid down) was fatal to the claim of the illegitimate children. In none of the wills was there such a manifestation of an intention to use the word *children* in any other than its ordinary legal signification (namely, legitimate offspring), as could form the ground of a judicial determination; and they show that the circumstances of the testator being a bachelor, and having illegitimate children at the time of the will, and of some of such children being the express objects of his bounty, and described as the "children" of the person to whose "other" children the gift in question is made, are not sufficient to divert the word from its established signification. In such cases, the conjecture, though highly reasonable, that the testator meant by the devise to discharge the moral obligation of providing for his illegitimate offspring is sacrificed to the general principle that "children," in its primary and unexplained sense, imports legitimate children only.

Bastards take under description of children, where.

It is of course no objection to the claim of illegitimate children that they are styled children, if they are otherwise identified, as *in the case of a legacy to "my son John, or my granddaughter Mary," the testator having no child or grandchild of those names, except such as are illegitimate. (q)

Gift to children "now living."

It is equally clear, that where the devise is to the children "*now living*" of a person who has no other than illegitimate children at the date of the will, they are entitled. (r)

[So in *Gabb v. Prendergast*, (s) where the ultimate limitation in a settlement was "to all the children as well those already born as hereafter to be born of A and B his wife," and it appeared that B had illegitimate children living at the date of the settlement, of whom A was the reputed father, but no legitimate children by him. Sir W. P. Wood, V. C., held the illegitimate children to be entitled. "There are numerous authorities (he said) deciding that the word '*procreandis*' may be read '*procreatis*,' and *vice versa* ; (t) but there is no authority deciding that when both these words are used either of them has been considered to be ineffective or inoperative." There seems to be no difference in this respect between a deed and a will, since, with refer-

(q) *River's Case*, 1 Atk. 410.

aided by the context.

(r) *Blundell v. Dunn*, cit. 1 Mad. 433, though the construction was somewhat

[(s) 1 K. & J. 439.

(t) *Ante* pp. *181, *183.

ence to the objects of gift, a will, like a deed, speaks from its date, not from the testator's death. (u)

And where (x) a testator, who at the time he made his will cohabited with a woman named A., and had by her two children, W. and R., gave a sum of money in trust to pay to A. the annual interest "during her life or until she married, for the support of her children W. and R.; and in case of her death or marriage to apply it to the use of *her children* ; and, on their coming to the age of twenty-one to divide the sum between them : " it was held that the only children intended by the testator to take the capital were those named in the provision for support during A.'s lifetime. It could not mean children *by marriage, for the right of the children to the present enjoyment of the fund was to depend on the happening of the very event from which the legitimate children were to spring.]

Gift to a person till marriage, then to her children.

Upon the same principle, a gift to "the children of *the late C.*" a person who, at the date of the will, was dead, leaving illegitimate, *but no legitimate*, children, has been held to be good as to such illegitimate children. (y) [And a gift to the children

Children of a deceased person.

(u) *Ante* vol. I., p. *337. It is proper to add that a different opinion was expressed by the V. C. "The difficulty (he said) would be greater in the case of a will than of a settlement. If the description in the will were 'all the children born or to be born,' pointing to a time which would include as a class all those children *in esse* at the death of the testator, it would occasion some surprise to the testator if he were told that by such a gift he had included all the illegitimate children which the parent referred to might have had." This seems to assume that with reference to the objects of gift a will speaks from the testator's death ; and so indeed the V. C. had lately decided, 1 K. & J. 315 ; but this was reversed, 7 D., M. & G. 283. And see further on the words in question, *Holt v. Sindrey*, L. R., 7 Eq. 170 ; *In re Nixon*, 2 Jur. (N. S.) 970 ; and though James, L. J., spoke slightly of their efficacy, it was in a case where he did not need their aid to make out the title of the illegitimate

child, *Crook v. Hill*, L. R., 6 Ch. 317.

(x) *In re Connor*, 2 Jo. & Lat. 456.]

(y) *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419. The terms of the bequest show that the fact of C's death was known to the testator. [Otherwise it should be proved *alimunde*, see *In re Herbert's Trusts*, 1 J. & H. 121. How far the testator's knowledge of the material facts may be presumed without actual proof, see *Ib.* and *Milne v. Wood*, 42 L. J., Ch. 545. The presumption that a woman of advanced age, who at the date of the will has no legitimate children, is past child-bearing, has never been made, so as to let in illegitimate children. In *In re Overhill's Trust*, 1 Sm. & Gif. 362, the age of forty-nine was deemed insufficient, and so in *Paul v. Children*, L. R., 12 Eq. 16, was the age of fifty. The analogous cases on the rule against perpetuity are against admitting the presumption in any case, *ante* p. *293. But see *Adney v. Greatrex*, 38 L. J., Ch. 414, *ante* p. *153.

—of two per-
sons who can-
not lawfully
marry.

of A by B, (who are within the prohibited degrees) must necessarily mean illegitimate children, since A and B cannot contract a lawful marriage. (z)

Whatever the language used, if the intention is manifest to benefit objects existing at the date of the will, and there are no legitimate children then in existence, illegitimate children will be entitled. Some of the cases, as might be expected, run very near each other: thus a gift to "the first-born son of my daughter A" (a spinster), was held not to designate an existing illegitimate son; (a) but a gift to "my sister A (who was a spinster) and her two youngest daughters," was held to designate individuals then in existence, and, consequently, to entitle the two youngest of three existing illegitimate daughters of A.] (b)

The characteristic feature of these cases, as distinguished from those of the former class, is, that, according to the state of facts existing when the will was made, legitimate children *never could have claimed* under the gift.

In some instances, however, of gifts to the children of a *deceased* person, illegitimate objects have been excluded, though such exclusion was not called for by the principle which negatives the claim of objects of this description, if in any event such claim might have come into competition with, and have been superseded by, the claim of legitimate children.

As, in *Hart v. Durand*, (c) where the bequest was "to the sons and daughters of the *late* J. D.," and there was only one *legitimate child (a daughter), to whom, it was contended, the words "sons and daughters" in the plural could not apply, and, consequently, that an illegitimate son and daughter then existing might be admitted; but the court decided against their claim; Macdonald, C. B., observing that the introduction of these objects would not satisfy both the words, *i. e.*, sons and daughters.

So, in *Swaine v. Kennerley*, (d) Lord Eldon decided that, under a devise to all and every the child and children of the testator's *late* son, a single legitimate child was entitled, to the exclusion of two children who were illegitimate, but all of whom were living at the date of the

(z) In *re Goodwin's Trust*, L. R., 17 Eq. 345.

(a) *Durrant v. Friend*, 5 De G. & S. 343.

(b) *Savage v. Robertson*, L. R., 7 Eq. 176.]

(c) 3 Anst. 684.

(d) 1 Ves. & B. 469.

will; and he refused to receive extrinsic evidence, to show that the illegitimate children were intended.

It will be observed that, in both these cases, as there was only one legitimate child living at the time of the making of the will, the terms of the gift, which embraced a plurality of objects, could not be satisfied without letting in the illegitimate children; and the argument (which is conclusive in the case of a gift to the children of a *living* person) (*e*) that the testator *may* have contemplated an accession to the number of objects by future births, or their total change by means of births and deaths, is inapplicable where (as in this instance) the parent was dead when the will was made. These cases, therefore, appear to have carried the exclusion of illegitimate children a step too far; and it is not surprising to find that they have been since departed from.

Thus, in *Gill v. Shelley*, (*f*) where A by a testamentary appointment gave her real and personal estate to her husband M. for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her will; adding, "amongst whom I include the children of the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir J. Leach, M. R., said that if *Swaine v. Kennerley* and *Hart v. Durand* had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed that the illegitimate child was entitled to share in the residue.

[Of *Swaine v. Kennerley* the M. R. is reported to have said that the expression there was "the child *or* children, &c.," and that this implied a doubt in the mind of the testator whether his late son *had more than one child; and of *Hart v. Durand*, that the expression "to every of the sons and daughters of my late cousin J. D.," manifested that the testator was ignorant of the actual state of J. D.'s family. (*g*) But neither distinction appears to have satisfied him; and indeed the former proceeded on a mistake; for the expression in *Swaine v. Kennerley* is "child *and* (not *or*) children;" so that] the only apparent distinction between that case and *Gill v. Shelley*, is, that in the former the bequest was to *child* and children, but which, it is conceived, makes no real difference, since the

Remark upon
Hart v. Du-
rand v. Du-
Swaine v.
Kennerley.

Remarks on
Gill v. Shelley,
Swaine v.
Kennerley and
Hart v.
Durand.

(*e*) In *re Yearwood's Trusts*, 5 Ch. D. 545.

(*f*) Stated *Wigram Wills*, pl. 55.

(*g*) 2 R. & My. 342.

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testator evidently uses the singular number, not with a view to the then existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. [In *Leigh v. Byron*, (*h*) where a testator made a bequest unto and equally amongst all and every the children of his *late* nephew A who should be living at the time of the testator's decease, and should attain twenty-one; and if there should be but one such child, then to such one child; and it appeared that A was dead at the date of the will, having left one legitimate and two illegitimate children: Sir J. Stuart, V. C., held the two latter entitled to share in the bequest; considering that the words "if there should be but one such child" only cut down the previous words of gift in the event of all the other children afterwards dying under twenty-one.

As to Sir J. Leach's explanation of *Hart v. Durand*, it is to be observed that the testator's knowledge of J. D.'s death, and the absence in fact of legitimate sons, almost necessarily excluded the idea that he intended to benefit possible legitimate sons. (*i*) And in *Edmunds v. Fessey*, (*k*) where a testator gave a legacy "to each of the sons and daughters of his *late* cousin living at his (the testator's) death," and there were two legitimate and two illegitimate sons, and one illegitimate but no legitimate daughter of the cousin, Sir J. Romilly, M. R., without further evidence of the testator's knowledge of the facts, held that it was impossible to exclude the illegitimate daughter.] (*l*)

It is submitted, therefore, that the cases of *Swaine v. Kennerley*, and *Hart v. Durand*, may be considered as overruled.

*It has been shown, that where [before the stat. 1 Vict., c. 26] (*m*)

What shows that testator does not contemplate marriage.

a testator, married or unmarried, gave to his children by a woman not then his wife, he was presumed (the contrary not appearing) to mean legitimate children; and, by neces-

sary consequence, to contemplate marriage with her. But it was settled, that if a married man, after making a disposition in favor of his children by a particular woman, showed by the context of the will that he expected both his wife and the woman in question to survive him,

(*h*) 1 Sm. & Gif. 486, 17 Jur. 822.

(*i*) See judgment of Wood, V. C., in *Herbert's Trusts*, 1 J. & H. 121.

(*k*) 29 Beav. 233. Of course the illegitimate sons were excluded. See also *Tugwell v. Scott*, 24 Beav. 141.

(*l*) Yet in *Adney v. Greatrex*, 38 L. J.,

Ch. 416, the M. R. said *Swaine v. Kennerley* and *Hart v. Durand* both appeared to him to be "remarkably good law."

[*m*] *Ante* vol. I., p. *128.]

this, being incompatible with the supposition of his contemplating marriage with her, was considered to indicate that he meant *illegitimate* children only.

Thus, in the well-known case of *Wilkinson v. Adam*,⁽ⁿ⁾ where a testator, being married, but having children by a woman named Ann Lewis, devised to *his wife* for life a certain mansion-house, and, after her decease, to Ann Lewis (who then lived with him) for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate (after limiting a terms of years thereout), *in trust for the children which he might have by the said Ann Lewis, [and living at his decease, or born within six months after,]* share and share alike, and to his, her and their heirs forever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil, (but which, being unattested, was inoperative to affect the construction of the devise,) ^(o) the testator declared that his meaning was to include three children of the said Ann Lewis (naming them.) The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis and having legitimate children by her; that the intention was clear that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already born, and not as to those afterwards born. But Lord Eldon, assisted by Thompson, B., and Le Blanc, J., and Gibbs, J., held that the three children were entitled by the effect of the whole will. The judges grounded their opinion on the manner in *which the testator described the children themselves, and Ann Lewis, their mother, as living with him whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship, to the time of her continuing single and unmarried, ^(p) with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife.

⁽ⁿ⁾ 1 Ves. & B. 422. [Of this case, Sir J. K. Bruce said it had often been considered to go to the extreme verge of the law, *Warner v. Warner*, 15 Jur. 142.]

^(o) See vol. I., p. *77.

^(p) These circumstances alone were clearly insufficient to vary the construction.

Where testator provides for his wife and his children by another woman in same will. for life, and, after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate.* (q) Lord Eldon concurred generally with the judges as to illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to *designatio personarum*, he considered that [viz. that they might take as a class] as decided by *Metham v. Duke of Devon*, (r) whatever might have been his opinion if it were *res integra*. In concluding an elaborate judgment, he expressed his opinion, that *it was impossible* that the testator, a married man, with a wife, who, he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean *anything but* illegitimate children. They took, therefore, by necessary implication, on the face of the will. (s)

Lord Eldon's doctrine, that the intention to give to illegitimate children (as distinguished from legitimate children) must appear [by necessary implication] on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family. Thus, in the case of a devise to "my children now living," (t) or "to the children of A," a *deceased person*, (u) it is not known by a mere perusal of the will whether legitimate or illegitimate children were intended; and yet, when it is *ascertained* that there were no other than the latter objects in existence, the conclusion that he meant illegitimate children is irresistible.

The characteristic of these cases is, that, according to the events

(q) Unless in the case of a divorce, which a man, especially when making a provision for his wife, can hardly be supposed to contemplate. It is singular, however, that this possible event was not adverted to in a case which underwent such elaborate discussion.

(r) 1 P. W. 529. [The gift was "to all the natural children of testator's son by Mrs. H." So, *Bentley v. Blizard*, 4 Jur. (N. S.) 652 ("the natural children of A.") See further instances of illegiti-

mate children taking as a class, *Barnett v. Tugwell* and following cases stated below.]

(s) This is a very brief summary of the grounds of the judgment, which should be perused by every inquirer into this subject.

(t) *Blundell v. Dunn*, cit. 1 Mad. 433, ante p. *222.

(u) *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419, ante p. *223.

existing at the making of the will, legitimate children never could have claimed under the bequest, and, therefore, could not have been in the testator's contemplation. [But "necessary implication" once allowed, does not stop there. It admits illegitimate children whenever it discovers on the face of the will a clear intention to make them the objects of gift, although legitimate children are also intended to participate. Thus] legitimate and illegitimate children may of course be comprehended in the same devise under a *designatio personarum* applicable to both; as, where a testator, having four children, two of each kind, gives to his four children then living. This would be a gift to them, not as a fluctuating class, with a possibility of future accessions, but to four designated individuals; and it being found that, to make up the specified number, it was necessary to include as well those who strictly and properly answered to that character, as those who had obtained a reputation of being such persons, the inevitable conclusion is, that the latter were included in the testator's contemplation. [It is equally clear that where a testator includes an illegitimate child, by name amongst "his children" and then gives property to "his said children," the illegitimate child is entitled to share with the legitimate, it being the same thing as if the testator had repeated the names. (x)]

Illegitimate may take with legitimate children under *designatio personarum* applicable to both;

A similar result has sometimes been attained without the aid of an express term of reference such as the word "said." Thus, in *Meredith v. Farr*, (y) a testator first bequeathed a sum of £300 in trust for his daughter E. W. for life, and after her death to be equally divided amongst the children of his daughters M. and C., that was to say, one moiety between the children of M., and the other moiety between the children of C. He then gave a second sum of £300 in trust for C. for life, and after her death "in trust for all and every the children and child of C., namely, William, John, Angelina, Sarah." And he gave a third sum of £300 in trust for M. for life, and after her death "for all and every the children and child lawfully to be begotten of M., and including her daughter Elizabeth, aged about fourteen." Of the enumerated children of C. William was legitimate, the three others illegitimate. And M., besides Elizabeth (who was illegitimate,) had at the date of the will several legitimate children, and another illegitimate child, Keziah.

—under gift to "children" where the word is explained by context.

[(x) *Evans v. Davies*, 7 Hare 498. And (y) 2 Y. & C. C. C. 525. see *Hartley v. Tribber*, 16 Beav. 510.

It was held by Sir J. K. Bruce, V. C., that the three illegitimate children of C. took shares in the *first* bequest of £300 as well as William the legitimate son of C., but that M.'s daughter Elizabeth, named under the word "including" in the third bequest, was not entitled to share in the first bequest, (z) the V. C. observing that "it would be too dangerous" to let her in. Keziah, who was not named at all, took nothing under the will; which agrees with another case where it was held that the express exception, from a bequest to children of one illegitimate child, did not raise a necessary implication that another illegitimate child was intended to take a share; (a) in other words, by styling *some* illegitimate children of A his "children," the testator does not necessarily prove that he means *all* illegitimate children of A to be viewed in the same light. (b) The distinction made between Elizabeth and the illegitimate children of C., with regard to their admission to the first bequest, corresponds with the difference in grammatical sense, which in strictness exists between the words "namely" and "including." "Namely" imports interpretation, *i. e.* indicates what is included in the previous term; but "including" imports addition, *i. e.* indicates something not included. But this is narrow ground.

Again, in *Owen v. Bryant*, (c) where a testator reciting that he had

(z) See also *Hibbert v. Hibbert*, L. R., 15 Eq. 372.

(a) In *re Wells' Estate*, L. R., 6 Eq. 599.

(b) See per Wigram, V. C., *Dover v. Alexander*, 2 Hare 281; *Edmunds v. Fessey*, 29 Beav. 233 (as to the illegitimate sons.)

(c) 2 D., M. & G. 697, 21 L. J., Ch. 860. See also *Worts v. Cubitt*, 19 Beav. 421 (which turned on the words "all my daughters," following a gift to "my natural daughter A and my other daughters.") But cf. *Smith v. Lidiard*, 3 K. & J. 252; *Thompson v. Robinson*, 27 Beav. 486. *Allen v. Webster*, 2 Gif. 177, was "not a case of illegitimate children at all," but a gift to the testator's "grandchildren;" and a bastard son being once recognized, all *his* legitimate children were of course included.

"Next of kin" *prima facie* means

legitimate kindred.—In *In re Standley's Estate*, L. R., 5 Eq. 303, a testator divided his estate among his illegitimate son and daughters by name, settling the shares of daughters, so that on the death of either without children her share was to go to her statutory next of kin, and providing that the share to which any daughter might become entitled *by virtue of the provisions thereinbefore contained as next of kin* of the son or other daughters should be settled likewise. One daughter died without children. The question seems to have been whether the testator had made his intention plain, that in ascertaining the next of kin (which *prima facie* meant legitimate kindred) the brother and sisters were to be deemed legitimate (as in *Wilson v. Atkinson*, 4 D., J. & S. 455.) Wood, V. C., held that he had not.

nine children by his then present wife, "namely, A, B, &c.," and that he had made certain provisions for his four married daughters, and wished to make a similar provision for his unmarried daughters, which he accordingly did in manner appearing by the will, proceeded to give the proceeds of his residuary real estate in trust for his wife for life, remainder between all and every his children by his said present wife who should be living at her decease, and directed his trustees to hold the shares of such of his *said* children as should be daughters upon certain specified trusts. It appeared that the testator was not married to his wife until after the birth of their daughter A; but it was held by the L. JJ., that she was entitled to share in the residuary bequest. Lord Cranworth said he rejected the notion of there being a rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift to children generally. But he based his decision on the passage containing the words "*said* children," coupled with the passage which, as he said, preceded it, and in which the testator enumerated his children by name: but for the words specified he would have thought that legitimate children only were intended. However, the last antecedent was, "children of my present wife," in the sentence immediately preceding. Sir J. K. Bruce thought the intention of the testator sufficiently apparent without the aid of the words "*said* children," and that consistently with the authorities, except, perhaps, *Bagley v. Mollard*, the case might be decided according to the plain intention of the testator.

Although in some of these cases the bequest may have been to a class admitting of increase to its legitimately-born members, in all of them the illegitimate members were included by individual designation. It was considered a doubtful point whether if there were no such designation, legitimate and illegitimate children could, under any circumstances, take together under the general description of children as a class. (c) But it is now clear, in accordance with Lord Cranworth's observation just cited, that they can; and that in all cases, although there is a very strong presumption that the word "children" means only legitimate children, yet it may denote a class including illegitimate as well as legitimate children if by necessary implication, or (more intelligibly) upon a just and proper construction of the words, you find

Illegitimate may, upon the context, take with legitimate children as a class.

(c) 1 Ves. & B. 452, 457, 468; 22 Beav. 339.

in the context an expression of intention that the illegitimate children shall take. (d)

*Such an intention was shown in the most unmistakable way in *Barnett v. Tugwell*, (e) where a testator bequeathed one-third of his property to his sister A. and her husband for their lives, and after their death to their surviving children; and if no such children, then to be "equally divided amongst the children legitimate or illegitimate of H." At the date of will H., as the testator knew, had several illegitimate children. There were five of them; and H. had no more afterwards. Of these five three only survived the testator. After the testator's death H. married and had nine legitimate children, three of whom died before A. A. survived her husband and died without leaving children. It was held by Sir J. Romilly that the one-third was divisible equally among the three illegitimate and the nine legitimate children of H. He said "*Wilkinson v. Adam* determines that natural children existing at the date of the will may take as a class, and not only so, but that they may take as a class under words plainly importing the testator's intention that after-born natural children should be included in this class" (an intention which the M. R. held could not be lawfully fulfilled): (f) and he added, "If this be so, I am unable to see in what manner I can alter the meaning of these words, as so interpreted by Lord Eldon, because legitimate children are united to take as a class with a class of illegitimate children then in existence. * * * As therefore the existing natural children of H. take as a class, those only who survived the testator form that class. (g) As to the legitimate children of H. it became vested in the children as soon as they came *in esse*, subject to be divested *pro tanto* for the purpose of admitting any additional child as a member of the class."]

Children of testator's "wife" to take whether his marriage be valid or not.

On the same principle in *Bayley v. Snelham* (h) where a testator, reciting that he had lately married in Scotland Jane W., the sister of his late wife, bequeathed per-

(d) Per Lord Cairns, *Hill v. Crook*, L. R., 6 H. L. 283; per Mellish, L. J., *Crook v. Hill*, L. R., 6 Ch. 318. And see per Stuart, V. C., *Holt v. Sindrey*, L. R., 7 Eq. 174; per Malins, V. C., *Dorin v. Dorin*, L. R., 17 Eq. 474.

(e) 31 Beav. 232.

(f) As to this *vide post* § 3.]

(g) See some further consequences of

the gift being a class-gift, *post* § 3.

[(h) 5 Ves. 534, n., also shortly reported 1 S. & St. 78, where the decision is made to turn on the words "begotten and to be begotten," as constituting a specific reference to the child already born, although those words are omitted from the statement of the gift.

sonal estate in trust for his said wife Jane for life, and after her decease to the children [begotten and to be begotten by him upon the body of] his said wife Jane: and he declared that his said wife Jane and her children should take the provisions thereinbefore made for them *in the same manner as if she had been married to him according to the usage of the Church of England and such marriage had been valid according to the English law. It [was alleged and was assumed] that the marriage was void according to the law of Scotland, and the question was whether the child born at the date of the will, being illegitimate, could take under the bequest; which Sir J. Leach, V. C., decided in the affirmative. [He observed that he had at first intended to direct an inquiry as to the validity of the marriage, but that it had been argued that this was not necessary, seeing that the gift was conveyed in terms which intended to give the benefit of it to the children of Jane, though she should turn out not to be his lawful wife. The V. C. added that he was much struck with the language of the will, and was of opinion that no inquiry was necessary, since, admitting for the sake of argument that the marriage was not valid, still the testator had made an express gift to children who had acquired the reputation of being his, and their illegitimacy was not made a condition of the gift but was merely a description of the persons.]

Even though it were clear, (and it would certainly be difficult to deny,) that had the testator subsequently married Jane W. and had legitimate children by her, (i) they would have taken under the bequest; the case, it is conceived, forms no exception to or contradiction of the doctrine that "children" *prima facie* means legitimate children; since it is evident the illegitimate child took not by virtue of the bequest to children simply as such, but under the clause providing for the event of the marriage proving to be invalid, and which must be considered as extending the bequest to illegitimate as well as legitimate children. In effect, therefore, it was a gift to the children legitimate or illegitimate of A.

[So, in *Hill v. Crook*, (k) John Hill, having a daughter Mary, who

(i) Before 5 and 6 Will. IV., c. 54, such marriages were in England voidable only. By that statute they are made absolutely void: therefore now a gift by a woman to her children by A who was her deceased sister's husband, necessarily means illegitimate children only, In *re Goodwin's Trusts*, L. R., 17 Eq. 345.

(k) L. R., 6 H. L. 265, affirming 6 Ch. 311.

To "the children of my daughter A, wife of B," testator knowing that the marriage was invalid.

(as he knew) had married J. Crook, her deceased sister's husband, and had issue by that connection, made his will, dated 1859, forgiving a debt due to him from "his son-in-law J. Crook," and devising leaseholds in trust "for

his daughter Mary, the wife of the said J. Crook," for her separate use, "independent of **her present* or any after-taken husband," and afterwards in trust for "the child, if only one, or all the children if

Hill v. Crook.

more than one, of his said daughter Mary Crook," with other clauses referring to his daughter as "Mary Crook ;"

it was held in D. P. that, although there was no reason why legitimate children might not take under the bequest, yet that two children of the testator's daughter by J. Crook, who were born before the date of the will, and had acquired the reputation of being the children of J. Crook, were entitled. Lord Chelmsford said : " I know of no objection in law to a gift to children, with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children." Lord Colonsay said it was clear to him that the testator intended the children of his daughter's union with J. Crook should be dealt with as if they were legitimate. Lord Cairns treated it as clear that a testator might "use the generic term 'children' so as to include illegitimate children along with legitimate children." The only question was, did the will in that case, upon a just and proper construction of its terms, show an intention so to use it? In his opinion it did. He said : "The terms 'husband' and 'wife,' 'father,' and 'mother,' and 'children,' are all correlative. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person, when he speaks of the 'children' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living 'wife,' and 'husband,' so, also, he means to term the offspring born of that so-called marriage the children according to that nomenclature. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires." (l)

(l) See also Dilley v. Matthews, 11 Jur. (N. S.) 425; Holt v. Sindrey, L. R., 7 [VOL. II. *233]

This decision seems to be independent of the fact that a valid marriage could not possibly be contracted between Mary Crook and John Crook. But the mere description of A. as "the wife" of B, will not bring their illegitimate children within the terms of a bequest to "the children of A," where there has been no marriage, valid or invalid, and where it does not appear that the testator knew the actual nature of the connection between A and B; for *non constat* that he used the word "wife" in any but its legal sense, or intended any but legitimate children to take.](*m*)

The rule then (expressed in accommodation to the cases) may be stated thus: In order to let in illegitimate children under a gift to children, it must be clear upon the terms of the will [when applied] to the state of facts at the making of it, that legitimate children never could have taken; [or that its terms, when so applied, never could have had full effect if confined to legitimate children.](*n*) This, it is submitted, forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to.

Thus, in *Beachcroft v. Beachcroft*, (*o*) where a testator who resided in the East Indies, and was a bachelor, and had had several children by a native woman, bequeathed as "To my children;" follows: "*To my children*, the sum of pounds sterling, 5000 each; *to the mother of my children*, the sum of sicca rupees, 6000, which I request my executors will secure to her in the most advantageous way." The question was, whether the illegitimate children were entitled? Sir T. Plumer, V. C., decided in the affirmative. He referred to *Goodinge v. Goodinge*, (*p*) and *Crone v. Odell*,

Eq. 170; *Lepine v. Bean*, L. R., 10 Eq. 160; *In re Brown's Trust*, L. R., 16 Eq. 239; *Perkins v. Goodwin*, W. N., 1877, p. 111.

(*m*) *In re Ayles' Trusts*, 1 Ch. D. 282.

(*n*) See per Lords Cairns and Hatherley in *Dorin v. Dorin*, L. R., 7 H. L. 573, 575; per K. Bruce, V. C., *Warner v. Warner*, 15 Jur. 141; per Stuart, V. C., *In re Overhill's Trust*, 1 Sm. & G. 366, 367.]

(*o*) 1 Mad. 430. [See also *Laker v. Hordern*, 1 Ch. D. 644, where, the testator having no legitimate children, a gift

to "my daughters" was held to mean existing illegitimate daughters, upon extrinsic evidence that he always treated them as his daughters, and so described them in the instructions for his will. It is submitted that the case is undistinguishable from *Dorin v. Dorin*, *post*, and that the decision cannot be supported. "Daughters" is not more appropriate than "children" to describe illegitimate daughters. Per Wood, V. C., *In re Herbert's Trusts*, 1 J. & H. 123.]

(*p*) 1 Ves. 231.

(g) as authorities that parol evidence was admissible as to the state of the testator's family when he made his will; and observed that, in the case of a latent ambiguity, parol evidence was admissible to prove the identity of the person intended to take, whether an individual or

—held to
extend to
illegitimate
children.

a class. That it had been established by *Metham v. Duke of Devon*, and *Wilkinson v. Adam*, that illegitimate children might take as a class; that if the words had been

"my present children," they might have taken as a class, to be ascertained by evidence, and being unmarried, (r) he must have meant his illegitimate children. His Honor admitted that the word "present"

Judgment in
Beachcroft v.
Beachcroft.

was not introduced in this will; but he observed that the general presumption is, that a man sitting down to make

his will designs a benefit to some existing object, and it was extravagant to suppose that the testator had only future possible children in view, disregarding those whom he was in the habit of denominating and treating as his children. Giving to each a definite portion, £5000, and the ultimate residue to his collaterals, showed that he had a definite number in view, and that he recognized his legitimate relatives as having a preferable title to a part of his fortune. That was rational enough if he was providing for illegitimate children, but was very unlikely if he was providing for future legitimate children. "For all these reasons," said his Honor, "I think it is reasonable to interpret the words 'my children' in the same way as if he had said, 'my present children.' But this construction of the will does not depend merely upon the first clause of it; for the next clause clearly shows what was meant, 'To the mother of my children the sum of sicca rupees, 6000, which I request,' &c. Was that a provision proper for the intended wife of a man of his fortune? Is it probable that, after giving one whom he thought fit to be his wife so small a sum, he should think it necessary that his executors should secure it for her?"

(s) Did anybody ever describe his wife by the term 'mother of my children?' If she had no children she would not have taken under this bequest. The second clause of the will is explanatory of the first; for, when once it is understood he therein meant to describe some person who had already become the mother of his children he

(g) 1 Ba. & Be. 481.

(s) Compare the general scope of this

(r) That this circumstance alone will reasoning with that of Lord Eldon, in *Wilkinson v. Adam*, 1 Ves. & B. 460. not let in illegitimate children, see *Kenebel v. Scafton*, 3 East 530.

then had, he must, under the term ‘children,’ have comprehended children already born, and consequently, as he was unmarried, his illegitimate children; and he must be supposed to have used the same word ‘children’ in the preceding clause in the like sense. I think, therefore, it is clear that existing persons were meant, and that they take, as in the case of *Wilkinson v. Adam*, as designated persons.”

A case more embarrassing to a judge could hardly have occurred, for no man reading this will with the knowledge of the testator’s situation, could really entertain a doubt as to illegitimate children being the objects intended; but that there was ground for holding *judicially* that such objects were “*upon the face of the will*” manifestly and incontrovertibly pointed out, is not equally clear. The circumstance of the amount of the bequest to the children and their mother, and the terms in which it was given, as differing from the mode in which a testator would refer to and provide for his future wife and her children, furnished exactly that species of conjecture, which in *Cartwright v. Vawdry* (t) was held insufficient to let in the illegitimate child. Indeed the division into fourths in that case supplied a stronger argument than the frame of the will in the case under consideration; and with respect to the argument founded on the bequest to the mother of the children, as showing that the testator referred to existing children, that is, children then having a “mother,” it is to be observed that the bequest to the mother is wholly dependent on, and is regulated by, the construction of the gift to the children; for, if the gift to the children standing alone would extend to future legitimate children, then the gift to their mother would be a gift to the mother of the testator’s legitimate children—in other words, to his wife.

In the course of his judgment the V. C. is made to say, “That no case has been found, where, when the word children has been used in the will of a putative father who has no legitimate children, it has been held that illegitimate children cannot take;” [but such a case now exists in *Dorin v. Dorin*, (u) where a man, having two illegitimate children, afterwards married their mother, and next day made his will giving his property to her for life and afterwards to “his children”

Construction not to be made to depend on the fact whether legitimate children come *in esse*.

(t) *Ante* p. *217.

[(u) L. R., 7 H. L. 568, reversing L. R., 17 Eq. 463. *Godfrey v. Davis*, 6 Ves.

43, *ante* p. *219, has been cited for the same point; but there the will was not by the putative father.

by her ; he died without lawful issue, and it was held in D. P. that the remainder failed. Lord Hatherley said, "It is not because you find in the outward circumstances that there are some children whom you think the testator ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given to them if you interpret them in another and a legal sense without altering a single word." And Lord Cairns said : "Supposing it had been in the testator's mind not to take any notice of these children in his will, but to make a provision for them in some other way, and to use his will to designate merely any legitimate children who *might be afterwards born, would not every word in the will be satisfied?"

But since the statute, 1 Vict., c. 26, a will not operating as an appointment is under all circumstances absolutely revoked by marriage, (x) and a gift by a bachelor to his children can never, therefore, take effect in favor of legitimate children. It seems not unreasonable to impute to a bachelor having illegitimate children a knowledge of this law, and thence to infer an intention in favor of the illegitimate children. And this was so held in *Clifton v. Goodbun*.] (y)

Another case which it is difficult to reconcile with the principles deducible from the general current of the authorities is *Fraser v. Pigott*, (z) where a testator, after bequeathing certain bank annuities to legitimate and illegitimate children by name of his two sons William and John, gave the residue of his estate to his said sons equally, and directed that if either of them should die in his lifetime the moiety of his deceased son should go to his *children* ; but if both his sons should die in his lifetime, he gave the same to and amongst all their *children* equally. Both the sons died in the testator's lifetime, John leaving three legitimate and two illegitimate children, and William leaving three illegitimate but no legitimate children. It was held, that the illegitimate children of John were not entitled to share with the legitimate children in the

Effect of 1 Vict., c. 26, on construction of gifts by a bachelor to his children.

Illegitimate children held entitled under gift to children.

(x) *Ante* vol. I., p. *128.

(y) L. R., 6 Eq. 278. The point appears to have been overlooked in *Pratt v. Mathew*, 22 Beav. 340 ; although in a former page (338) it had been referred to as it affected a gift to a "wife." *Beachcroft v. Beachcroft* has even been cited in

support of the same general proposition before the statute, *Preston on Legacies* 201 ; [but the *ratio decidendi* in that case was that the special context of the will pointed to *present* children.]

(z) You. 354 [disapproved by *Shadwell*, V. C., 14 Sim. 216.]

residue, but that the illegitimate children of William, who left no legitimate child, were to be admitted. Lord Lyndhurst, C. B., said, "It seems to be clear, upon the cases, that where there are any legitimate children to answer this description of children, then, according to the rule of law, the legitimate children only will take. If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended; but where there are legitimate and illegitimate children, legitimate children only will take under the description of children. In this case the illegitimate children of William Fraser, and the legitimate children only of John Fraser, appear to me to be entitled."

This decision, so far as it operated to admit the illegitimate *children of William to participate in the residue, stands directly opposed to the principles and doctrines of the long line of cases treated of in this chapter, from *Cartwright v. Vawdry* to *Bagley v. Mollard*, including a decision of the C. B. himself, when Chancellor. (a) To say that illegitimate children can take under a bequest which would have applied to legitimate objects if there had been any such, makes the construction of the will dependent on subsequent events, as the testator's son William, who was then living, might have had legitimate children in the interval between the making of the will and the testator's death; and as such children would have taken, the illegitimate children, according to the established doctrine of the cases, clearly could not. The remark as to the admissibility of extrinsic evidence is no less exceptionable than the decision. The office of extrinsic evidence in these cases is, to ascertain the state of facts existing at the date of the will, which often throws light upon a testator's intention, and is properly admissible for that purpose. (b) But if this eminent judge is to be understood to mean, that because in event no legitimate child happens to claim under a bequest to children, extrinsic evidence is admissible to show that the testator actually meant to comprise illegitimate children under the description of children, his position is directly encountered by a crowd of decisions and *dicta*, including those of Lord Eldon, who, we have seen, in his elaborate judgment in *Wilkinson v. Adam*, earnestly and repeatedly inculcated the doctrine, that the intention in favor of illegitimate children must appear by necessary implication on the face of the will itself. If the testator's sons, John

Remarks on
Fraser v. Pig-
ott.

(a) *Mortimer v. West*, 3 Russ. 370.

(b) *Ante* ch. XIII.

[VOL. II. *238]

and William, had been dead at the date of the will, the decision would have been consistent with antecedent adjudications; and as they are called in the statement of the will, in the report of the case, the testator's *late* sons, a cursory perusal of the case is likely to lead to an impression that such was the fact; but from the tenor of the whole statement it is evident that the sons died *after* the making of the will, and therefore the attempt in this manner to reconcile the case with anterior determinations fails.

II.—It is now clear that a gift to a natural child of which a particular woman is *enciente*, without reference to any person as the father, is good. Thus, in *Gordon v. Gordon*, (c) where a *testator recited that he had reason to believe that A was then pregnant *by him*, and subsequently directed that the child of which she was then pregnant (not repeating the words “by me”) should be sent to England, and the expense paid for by an annuity, &c. Two questions were raised: first, whether the bequest was not void, on the principle of the early authorities, as a gift to an unborn bastard; secondly, whether it was not invalid as a gift to an illegitimate child *en ventre sa mere by a particular man*. Lord Eldon said, “Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the opinion of Lord Coke, that, if an illegitimate child *en ventre sa mere* is described so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I studiously abstain from expressing any opinion as to what it would be if the words were ‘to my child,’ while I decide that the words being only ‘the child with which A is now pregnant,’ those words will do, so as to give effect to the will in its favor.”

The distinction between the preceding case and those in which the paternity forms part of the description is obvious. Where the gift is to the child with which a particular woman is *enciente*, generally, the fact of birth is the sole ground of title, and that is easy of ascertainment. On the other hand, a gift to the child with which a woman is *enciente by a particular man*, introduces into the description of the object a circumstance which the law

(c) 1 Mer. 141. See also judgment in *v. Dawson*, 6 Mad. 292.]
Earle v. Wilson, 17 Ves. 532; [*Dawson*

treats as uncertain (a bastard being, in respect of his paternal parent at least, *filius nullius*), and which it cannot properly permit to be inquired into; and the devise is, therefore, unless the fact in question can be assumed, necessarily void. And this principle, it seems, extends even to gifts by a testator to his own child, if the fact of his parental relation to the object be unequivocally made part of the qualification.

Thus, in *Earle v. Wilson*, (d) where a testator bequeathed to "such child or children, if more than one, as M. may happen to be *enciente* of *by me*," Sir W. Grant held it to be void. Such a gift held invalid, though proceeding from the father. There was no gift, he said, to the child of which M. might be *enciente*, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was *required, that is, reject the words "by me" as superfluous. "Suppose," he observed, "the words 'as she may happen to be *enciente* of by me,' could be taken to mean, 'as she is now *enciente* of by me,' in which there is considerable difficulty; yet if the rule of law does not acknowledge a natural child to have any father before its birth, the change of phrase would not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the description, *non constat* that the gift would ever have been made."

It will be observed that Lord Eldon in *Gordon v. Gordon*, (f) cautiously abstains from giving an opinion on the point decided by Sir W. Grant in *Earle v. Wilson*, and had, it seems, obtained the concurrence of that learned judge in the opinion he then pronounced. But the authority of *Earle v. Wilson* has been since questioned in *Evans v. Massey*, (g) in which a testator, who resided in India, Evans v. Massey. devised as follows:—"Having two natural children, *and* the mother supposed to be now carrying a third child, I bequeath the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them; that is to say, if another child should be born by the mother of the other two, in proper time, that such child is to have one-third of such property." The testator appointed certain persons guardians of *his* children, and in the bequest of the

(d) 17 Ves. 528.

(g) 8 Pri. 22.

(f) 1 Mer. 141, stated *ante* p. *238.

residue expressed himself thus, "after paying *my* natural children as aforesaid." The question was, whether the bequest to the child *en ventre sa mere* was made to it as the child of the testator, or whether, on the other hand, it was not to the child with which the woman was *enciente*, without reference to the father as an essential part of the description. Richards, C. B., was of opinion that the bequest was

Earle v. Wilson questioned by Richards, C. B.

good. He considered the case to be distinguished from *Earle v. Wilson*, as to which, however, he observed, that

he did not understand the grounds upon which it proceeded, and therefore could not entirely accede to it; that the decision excited surprise at the time, and that some of the judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord Eldon in *Gordon v. Gordon*, he proceeded: "We have therefore only to inquire, in this case, whether there be in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction *requires, that in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, 'Having two natural children, and the mother supposed to be now carrying a third child.' Now he does not say, 'with which she is pregnant *by me*,' but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact; then he bequeaths to such child the legacy in question. It is quite clear that there is nothing in the words of the bequest *so far*, asserting that the child was his, or that he thought so; for, although there can be no doubt that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularizing the child that she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then supposition should turn out to have been incorrect. Now the only difficulty arises from the testator having afterwards, in alluding to the children, called them *his*; and upon that it has been considered that this case is within the reasoning and the principle of the decision in *Earle v. Wilson*, because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child as one of his children, and that it is given to it entirely on that consideration, as the basis and condition prece-

dent of the gift. I do not, however, think that these subsequent words can be considered as so applying to the bequest itself, as to modify and control it. They were merely a reference to it, and were not intended to have any effect upon it. The allusion does not show that he meant the child to take only in case of its being his, nor does it amount to an assertion that the child was his, or that the testator considered he was giving to it the legacy solely as his child."

It is to be inferred from the observations of the C. B. that the principle upon which he founded his objection to *Earle v. Wilson* is this: that where a testator gives to the child or children with which a particular woman is *enciente by him*, although he describes the child as his own, yet that he intends to make it the object of his bounty at all events, assuming his parental relation to the child as a fact *not farther to be inquired into*: but, as the learned judge thought that in the case before him the child was not so described, *Earle v. Wilson* remains uncontradicted by his decision. It is clear, however, that the court will not act upon the principle of that case, unless the testator's intention to make the fact of his parentage to the unborn infant an essential part of its description be unequivocally demonstrated.

[It has been said, however, that a child *en ventre sa mere* is a child *in esse*, and may have a name by reputation. (h) If so, a reputation regarding its paternity acquired at the date of the will by a child *en ventre* should be as efficacious as a reputation then acquired by a child previously born, to bring it within the description of a child by a particular father. But all the cases were argued and decided on the opposite assumption, and Lord Eldon laid it down clearly that until born a child has no reputation. (i) There appears, at least, to be no case in which reputation acquired before birth has been recognized, and Sir W. James, L. J., has intimated that, in his opinion, there would be great if not insuperable difficulties in the way of proving it. (k)

The question would seem to have been involved in the facts of *Crook v. Hill*, (l) where, besides the two

Remarks on
Evans v. Massey.

Whether child
en ventre may
have a name
by reputation.

Crook v. Hill,
cor. Hall, V. C.

[(h) By Sir E. Sugden, 2 Jo. & Lat. 460; also by Romilly, M. R., 22 Beav. 339, 340. cision referred to children by a particular father.

(i) 1 Mer. 152, agreeing with Lord Macclesfield, *Metham v. Duke of Devon*, 1 P. W. 529, where *dictum* as well as de- (k) In *Occleston v. Fullalove*, L. R., 9 Ch. 158.

(l) 3 Ch. D. 773, will stated *ante* p. *232.

children born before the date of the will, the testator's daughter Mary had another child born after the testator's death, which (as the testator is stated to have known) was *en ventre sa mere* at the date of the will. There was no specific reference to that child; but it was held by Sir C. Hall, V. C., that it came within the class described as "the children of my daughter Mary Crook." He observed that as a general rule (*i. e.*, in case of a lawful marriage) a child *en ventre* is included in a trust for children, and continued, "The case, both before the L. JJ. and in D. P., has proceeded on the view that the testator had thought proper to make a will based on the assumption that the union of his daughter with J. Crook was a legal marriage, and all his dispositions for the objects to take under his will are framed upon this footing. It is clear then that, meaning as he did by the word children the issue of that union, he must be taken to have meant to include a child *en ventre sa mere*."

That is to say, the testator meant this child to be included if it was a child of that "union." Now, the marriage being invalid, the only admissible evidence that the child was the issue of that union was reputation: for, of course, the testator could not cause *his assumption of the validity of the union to prevail so far as to dispense with this evidence. But no allusion was made to this point, and no such evidence was asked for; (*m*) and the decision seems to require the further assumption that the testator intended every child of his daughter born during that "union" to be taken to be a child of that "union:" thereby, in effect, eliminating the question of paternity altogether. In this respect the decision appears to depart from the ground taken in D. P. The reputed paternity of the two elder children was there proved (*i. e.*, admitted on demurrer,) and was, it is submitted, essential to their claim; for though the gift was to the children of Mary Crook (without saying "by J. Crook,") yet this would have been completely satisfied by applying it to her legitimate children (who, it will be remembered, were considered to be included,) and to them alone, if the court had not found on the face of the will an intention to include her illegitimate children by J. Crook. It is to be observed, however, that the claim of the child *en ventre* was virtually unopposed.

But if the child which is *en ventre* at the date of the will is after-

(*m*) The statement that testator "knew" (*m*) The statement that testator "knew" tion") seems to imply a species of evidence which the law will not permit to be given.

wards born, and before the testator's death acquires the reputation of being child of the person described as father, the difficulty would seem to be removed. Unless the fact of paternity be clearly made a condition of the gift, there appears to be no reason for making a distinction in this respect between a gift specifically to a child *en ventre*, and a gift to children generally, described as by a particular father; and with regard to the latter, as we shall hereafter see, reputation acquired at any time before the death of the testator, when the will comes into operation, has been held sufficient.](n)

Child afterwards born and gaining repute before testator's death.

*III.—The preceding sections leave untouched the question respecting the validity of a devise or bequest to the illegitimate children, *not in esse*, of a particular woman, without reference to the father. The state of the law on the subject seems to be this: the early authorities are opposed to gifts to such objects, on the ground “that the law will not favor such a generation,

Whether gifts to bastards not *in esse* good.

(n) *Occleston v. Fullalove*, L. R., 9 Ch. 147, 159, 170; *In re Goodwin's Trust*, L. R., 17 Eq. 345; *Perkins v. Goodwin*, W. N. (1877), p. 111 (testator not the father.) *In Gordon v. Gordon*, 1 Mer. 150, the question of subsequent recognition of the child was mentioned, but not determined, her claim being upheld on other grounds. *In Earle v. Wilson* and *Evans v. Massey* the child was not born until after testator's death. **Metham v. Duke of Devon.**—Lord Selborne is reported (L. R., 9 Ch. 158) to have said, “In *Metham v. Duke of Devon* the child *en ventre* at the date of the will was born and *in the testator's lifetime acquired the same reputation* (*i. e.*, of being the duke's child by Mrs. H.), but this child, as well as all others born still later, was excluded:” which if correct would put that case in opposition to those cited above. But the italicized portion of the statement is not contained in 1 P. W. 529, nor in R. L. 1718, B. fo. 215. According to the latter book there were but six children of the duke (the original defendant) by Mrs. H. The plaintiff alleged that five only, including

herself, were born before the date of the deed-poll (will), but that Henrietta, the sixth, claimed a share, though born after the death of the testator: Henrietta answered that all six “were born at the time of the said deed, or at leastwise before the said (testator's) death, and the said duke owned them all” (not saying, in the testator's lifetime.) The declaration, extracted 1 P. W. 530, n., is followed by a direction for an inquiry “what children or reputed children of Lord C. (the duke) by the said Mrs. H. were living at the date of the said deed-poll.” No mention is made in R. L. of one of the children being *en ventre* at the date of the deed. This fact depends on P. W.; and Henrietta, being the only one whose claim was disputed, was doubtless that child; but that she had *in the testator's lifetime* acquired the reputation of being a child of the duke by Mrs. H. or that there were any “other children born still later” does not appear by either book: nor is the date of the testator's death given. The report does not intimate that the inquiry led to any further hearing.]

nor expect that such shall be." (o) *Dicta*, however, have been thrown out by recent judges which cast a doubt upon the old opinion. In *Wilkinson v. Adam*, (p) Lord Eldon observed, that he knew no law against such a devise; but he afterwards said, (q) that whether the cases in Lord Coke, (r) which were all cases of deeds, had necessarily established that no future illegitimate child could take under any description in a will, whether that was to be taken as the law it was not necessary to decide in that case. He would leave that point where he found it, without any adjudication.

Undoubtedly, if the objection to gifts of this description was referable simply to the ground of uncertainty, there would be no difficulty in saying, in opposition to the early authorities, that such a devise might be sustained, as it is evident that a gift to the future illegitimate children of a *woman* does not involve greater uncertainty than such a devise to legitimate children. But it is conceived that there remains a serious objection to the validity of such dispositions, on grounds of public policy.

To support the great interests of morality is part of the policy of every well-regulated state, and has long been a principle of the law of England, which has uniformly refused validity to provisions offering a direct incentive to vice; as in the case of bonds given with a view to cohabitation, the fate of which is well known. The same principle, it may be contended, applies to gifts in favor of the objects in question. It is true that *here* *the unoffending offspring, and not the delinquent parent, is the subject of them; but it requires no great insight into the ordinary springs and motives of human action, to perceive that bounty to the offspring may act as a powerful engine to subvert the chastity of the parent. Suppose a large estate to be devised to every future *illegitimate* child of an indigent woman, would not such a provision hold out a strong encouragement to incontinency? Cases might be suggested which would place the argument of immoral tendency in a strong point of view; but since in gifts to future illegitimate children they are generally described as the offspring of a particular man, which [as regards those begotten after the testator's death] renders them indisputably void, the writer

(o) See *Blodwell v. Edwards*, Cro. El. 510.

(p) 1 Ves. & B. 446. [But the context shows that he was speaking only of such as were begotten in the testator's lifetime

and born "within the longest period allowed for gestation."]

(q) 1 Ves. & B. 468.

(r) Co. Lit. 3 b.

will only further observe, that the view which has been taken of the subject is not at all prejudiced by the decisions establishing the validity of gifts to bastards *en ventre*; for as in these cases the immoral act, which it is the policy of the law to discourage, has been done, the argument on which the objection is founded, does not apply, and they fall within the principle which allows validity to provisions founded on the consideration of *past* cohabitation.

[Lord St. Leonards expressed a clear though extrajudicial opinion that public policy, and not uncertainty, was the ground of objection to gifts to future illegitimate children. Referring to his own argument in *Mortimer v. West*, he said he still retained the same opinion as he had then formed after a careful search into the authorities. According to his impression of the authorities, they authorized the position that it made no difference whether the father was referred to or not. That it was on the ground of public policy that such gifts were held to be void, not because of the difficulty or indelicacy which might ensue in pursuing an inquiry as to the paternity of the child. (s)]

As regards provisions for children to be begotten after the instrument comes into operation, *i. e.*, as to deeds the time of execution, and as to wills the time of testator's death, this doctrine is nowhere denied: such children, whether described as the issue of the woman, or of the woman by a particular man, cannot take. (t) But as to a will there is yet another period to be considered, viz., that which comes between its execution and the testator's death. Testamentary provisions for children to be begotten during this period also were held void, as being *contra bonos mores*, by Sir J. Romilly, M. R., (u) and Sir W. P. Wood, V. C. (v) Indeed no distinction between the two cases was ever expressly drawn (though it is probably what Lord Eldon hinted at in the passage cited above) until it came to be discussed in *Occleston v. Fullalove*, (x) where a testator gave real and personal estate in trust for "his sister-in-law" M. L. (with whom he had gone through the form of marriage) for

—as to children begotten after testator's death;

—but not as to children begotten between the will and testator's death.

Occleston v. Fullalove.

[(s) In *re Connor*, 2 Jo. & Lat. 459.

(t) Per James and Mellish, L. J.J., 9 Ch. D. 160, 166, 167, 171; *Crook v. Hill*, 3 Ch. D. 773 (as to Edward.)

(u) *Medworth v. Pope*, 27 Beav. 71, and *Lepine v. Bean*, L. R., 10 Eq. 160 (gifts by reputed father.) See also Pratt

v. Mathew, 22 Beav. 334, and per Lords Chelmsford and Colonsay, L. R., 6 H. L. 278, 280.

(v) *Howarth v. Mills*, L. R., 2 Eq. 389 (gift by mother.)

(x) L. R., 9 Ch. 147.

life, and after her death for "his reputed children C and E, and all other the children he might have, or be reputed to have, by the said M. L. then born or thereafter to be born." A third child of M. L., which was *en ventre sa mere* at the date of the will, was born before the testator's death, and was by him acknowledged and described in the register of births as his. Sir J. Wickens, V. C., held that this child was not entitled to share. On appeal, the court was divided: Lord Selborne agreed with the V. C.; but James and Mellish, L. JJ., differed from him on the technical ground that a will was always revocable during the testator's life, and could therefore be no inducement to himself to continue an immoral life, or at any rate that this was too uncertain to be made a ground of decision. As to the woman, there was no evidence that she knew the will was made, and if she did, she must also have known that it could be revoked at any moment.

Sir W. James gave a new turn to the familiar reflections on the duty of providing for "the unfortunate beings of whose existence one is the author." Those reflections are usually (and particularly by Lord Eldon) (y) applied only to children begotten before the date of the will; but the L. J. extended them to children afterwards to be begotten; he thought it a shocking and perverse thing to deny to a man "living in an unhallowed connection," *which he means to continue*, the right of making a will beforehand in favor of the illegitimate children which "in the course of nature" he expects to beget, and which the L. J. pictured as becoming, in consequence of that denial, "pariah outcasts infesting the public streets." (z) But if this denial is *of such serious consequence, the deterrent force of it must be admitted; and Lord Selborne said, "In however forcible a light the difference for this purpose between a gift by deed and such a gift by will may be presented, I am not satisfied that the distinction can be practically established without a material encroachment upon the principle which is admitted to stand in the way of a prospective provision by deed for future illegitimate children." But the decision was reversed in obedience to the opinion of the majority of the court.

(y) 1 Mer. 148, 149.

(z) The L. J. added, "what appeared to him a *reductio ad absurdum* of this supposed rule of public policy: Take the case of a gift to a concubine of the man's property charged with the maintenance and education of her offspring described as in that will; did morality require that

this court should give her the whole, leaving her if she pleased to throw the offspring on the streets?" Now the law has provided for such a case by rendering a woman so doing punishable as a rogue and a vagabond (7 and 8 Vict., c. 101, § 6.)

As to the sufficiency of the description to identify the objects of gift, reliance was placed by Sir W. James on the gift being to the testator's "reputed" children, as relieving the case from the difficulty which would have existed if the gift had been "to my future children by A B," which he thought would have annexed the condition that they shall be really his children. But Lord Selborne considered that this made no difference, the identity of the objects being in both cases equally proved by evidence of reputation: and in *In re Goodwin's Trust*, (a) where a testatrix bequeathed personalty in trust for A (who had been her late sister's husband) for his life, and after his death for "all my children by A," it was held by Sir G. Jessel, M. R., that an illegitimate child of the testatrix born several years after the date of the will, and registered by A as the son of himself and the testatrix, was entitled to share. The M. R. said the principle of *Occleston v. Fullalove* was that a gift by a man or woman to one of his or her children by a particular person was good if the child had acquired the reputation of being such child as described in the will before the death of the testator or testatrix.

Distinction between gift "to children," and "to reputed children" of a man.

In *Occleston v. Fullalove* (b) Lord Selborne, having delivered his opinion that the gift was void as to the general class of children who might be born after the date of the will, held that as a necessary consequence it was void also as regarded the child *en ventre* at the date of the will, "for the reasons which were well stated by Lord Romilly in *Pratt v. Mathew*, (c) against separating from the general class of after-born children a child who was *en ventre sa mere* when the will was made, but to whom there is no gift otherwise than as a member of that general class." Sir G. Mellish, L. J., also with reference (it would seem) to this point, distinguished the case where the will was that of the putative parent from *Metham v. Duke of Devon* and *Hill v. Crook*, where it was the will of a third person, and where therefore the word "children" might (so far as the construction of the will was concerned) have included children begotten after the death of the testator, which children he did not deny would be prevented from taking on grounds of public policy.

Effect, where the class includes future as well as existing children.

But in *Pratt v. Mathew*, Lord Romilly was dealing with a different case from *Occleston v. Fullalove*. He rejected the claim of the child

(a) L. R., 17 Eq. 345.

(c) 22 Beav. 334, 340.

(b) L. R., 9 Ch. 147, 157.

en ventre in the case before him, not on account of its supposed inseparability from the general class as a member of which it must (if at all) be admitted, but expressly because in his opinion the class included legitimate children only. He decided against the child *en ventre* because it was not a member of the class; Lord Selborne because it was. But claiming under a general gift to "after-born children" does not make the child *en ventre* (who *ex hypothesi* is sufficiently described by it) less a child *in esse*, though the rest of the class not being *in esse* are incapacitated by law. The words are the same for all, but the things signified are different. Why should not the child *in esse* (provided it acquires the necessary reputation in the testator's lifetime) have the benefit of the general rule which regulates gifts to a class,

General rule
that capable
members of a
class take the
whole fund.

viz., that those members who at the testator's death, or at any time between that event and the period of distribution, are capable of taking, take the whole, and that those members who are incapable whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law, take nothing. (d)

Lord Selborne's opinion was limited in terms, and it would appear designedly so, to cases where the general class is restricted in point of expression or description, to future-born children; (e) and in that respect it differs from the opinion suggested in the distinction taken by Sir G. Mellish; for this applies to cases where the class might include, though it is not restricted to, after-born children. But in *Crook v. Hill* (f) no objection to the right of the child *en ventre* at the date of the will was suggested on the ground of its supposed inseparability from those who were begotten after the testator's death; nor, it is conceived, could any such objection have been maintained consistently with the decision previously made in *D. P.* in favor of the two elder children.

*In further illustration of the doctrine that under a gift to illegitimate children as a class, including after-born children
Lepine v. Bean. who are incapable of taking, those take (*i. e.*, form the class) who are capable, and take the whole, reference may be made to

(d) See 4 Ch. D. 173.

(e) He remarked, (L. R., 9 Ch. 152,) that the child *en ventre* "took if she took at all only as a member of the class of future reputed children," as if these were to be reckoned a distinct class from the

other children. It is submitted, however, that there was but one class, and that this class included the two children who were named as well as all the others.

(f) 3 Ch. D. 773.

Lepine v. Bean, (*g*) where a testator having a wife of advanced age, from whom he lived separate, gave real and personal estate in trust for M., a woman with whom he cohabited and whom he called his wife, for her life or widowhood, and afterwards for his children (which upon the context was held to include his natural children by M.) as tenants in common : at the date of the will he had one illegitimate child by M. living, namely L., and afterwards had another ; it was held that the latter could not lawfully take, (*h*) and it was contended that there was consequently an intestacy as to a moiety ; but Lord Romilly, M. R., observed that although the testator might have intended after-born children by this woman to be included, in contemplation of law he had none ; and he held that L., as the sole member of the class, took the whole. (*i*)

So in *Perkins v. Goodwin*, (*k*) where, by will dated 1851, a testator gave real and personal estate in trust for his wife for life, then for his sister Mary wife of R. P., for her separate use independent of her present or any future husband, for life, and after her death for such children of his (testator's) said sister as should then be living." Mary had gone through the form of marriage with R. P., who was her brother-in-law. By him she had in the testator's lifetime two children, one born before the date of the will, the other several years after, both of whom acquired in the testator's lifetime the reputation of being children of Mary by R. P. These facts were known to the testator. The two children survived their mother, and being sufficiently designated within *Hill v. Crook*, (*l*) were held by Sir G. Jessel, M. R., to be entitled in equal shares.]

*Perkins v.
Goodwin.*

*General con-
clusions.*

IV.—Upon the whole, the general conclusions from the cases seem to be :—

1st. That illegitimate children may take by any name or description which they have acquired by reputation *at the time of the making of the will* ; but that,

(*g*) L. R., 10 Eq. 160.

(*h*) This was before *Occleston v. Fulllove*, *sup.*

(*i*) Thus the M. R. did not adhere to the suggestion which he threw out in *Chapman v. Bradley*, 33 Beav. 65, 66, viz., that some intended members of the class being disabled from taking, the gift

to the class failed altogether, on the principle of *Leake v. Robinson*, 2 Mer. 363. Such cases appear to be distinguishable : in them the intended period of distribution is too remote, and never arrives.

(*k*) W. N. (1877), p. 111.

(*l*) *Ante* p. *232.]

2nd. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest upon the face of the will ; and if, by possibility, *legitimate* children [alone would have satisfied the terms of] such gift, illegitimate children *cannot* take ; though children, legitimate and illegitimate, may take concurrently under [such a gift if the terms of it cannot be satisfied without including the latter.]

3d. That a gift to an illegitimate child *en ventre sa mere without reference to the father*, is indisputably good.

4th. That a gift by a testator to his *own* illegitimate child *en ventre sa mere* has been decided in one instance (*Earle v. Wilson*) to be void ; but the point admits of considerable doubt.

5th. That a gift to the future illegitimate children of a *man*, or of a woman by a particular man, [*i. e.*, children not begotten at the testator's death,] *is clearly void*.

6th. That a gift to *future* illegitimate children [in the same sense] of a particular woman, even irrespective of the father, [cannot] be sustained, against the objection founded on the immoral tendency of such a disposition.

[7th. But a gift by a man or woman to the illegitimate children of himself or herself, or of another, by a particular person, is good if they are born and have acquired the reputation of being such children before the death of the testator or testatrix.]

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 On p. 586, note 3, Wms. Ex'rs should be cited to pp. "1118" and "1196," for "1055" and "1110."
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